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## Innocence Is Different: Taking Innocence into Account in Reforming Criminal Procedure

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## Innocence Is Different: Taking Innocence into Account in Reforming Criminal Procedure

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## INNOCENCE IS DIFFERENT

*Given the defense lawyer's casual relationship to truth, there is a stunning change of perspective when a lawyer represents an innocent person. Suddenly there is nothing more important than the truth, nothing more sacred. Now the lawyer who is ordinarily indifferent to the truth is plagued by it and outraged that the system is indifferent to it.*

—Abbe Smith<sup>1</sup>

### I. INTRODUCTION

It has often been said that “death is different,”<sup>2</sup> meaning at a minimum that the ultimate finality of the death penalty requires both special standards for its imposition and special care in applying those standards. But what has generally been overlooked is that “innocence is different” also. What we mean by this is that the protection of the actually innocent<sup>3</sup> from conviction should be a paramount goal of the criminal justice system against which all procedural rules and policies should be judged. Despite the traditional rhetoric that recognizes this,<sup>4</sup> too often the protection of the innocent takes a back seat to other goals, such as the conviction of the guilty—or even, ironically, the protection of the guilty.<sup>5</sup>

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1. ABBE SMITH, *CASE OF A LIFETIME: A CRIMINAL DEFENSE LAWYER'S STORY* 83 (2008).
  2. The root of the phrase “death is different” is generally traced to the concurrence of Justice Brennan in *Furman v. Georgia*, 408 U.S. 238 (1972), which contained a section on the special nature of the death penalty, with phrases such as “Death is a unique punishment” and “Juries . . . have always treated death cases differently.” *Id.* at 286 (Brennan, J., concurring). For other uses of the phrase “death is different,” see Stephen Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1, 41 (1980) (using the phrase “death is different” in quotation marks); *id.* at 41 n.184 (tracing the phrase to *Gardner v. Florida*, 430 U.S. 349, 357 (1977)—“death is a different kind of punishment”—which in turn traces the concept to Justice Brennan’s concurrence in *Furman*, 408 U.S. at 286 (Brennan, J., concurring)). Actually, the phrase “death is different” without the quotation marks occurred in the earlier case of *Gregg v. Georgia*, 428 U.S. 153, 188 (1976), where the phrase is also traced to *Furman*. “While *Furman* did not hold that the infliction of the death penalty *per se* violates the Constitution’s ban on cruel and unusual punishments, it did recognize that the penalty of death is different in kind from any other punishment imposed under our system of criminal justice.” *Id.* at 188. The first use of the phrase as a set phrase in quotations appears to have been in Michael D. Rhodes, Comment, *Resurrection of Capital Punishment—The 1976 Death Penalty Cases*, 81 DICK. L. REV. 543, 563 n.159 (1977) (discussing the plurality opinion in *Gregg* and arguing that the proposition that “‘death is different’ was intended not so much to justify requiring such individual consideration in capital cases, but rather to discourage extension of this requirement to noncapital cases”).
  3. The term “actual innocence” is used here to mean in particular “brute fact” innocence, as discussed in D. Michael Risinger, *Unsafe Verdicts: The Need for Reformed Standards for the Trial and Review of Factual Innocence Claims*, 41 HOUS. L. REV. 1281 (2004) [hereinafter *Unsafe Verdicts*], “particularly, cases where the defendant was not the perpetrator of the crime, and someone else was,” as opposed to the possible varieties of another kind of innocence involved in complex “normative judgment” cases. For an expanded discussion, see *infra* note 24.
  4. See, e.g., *Herring v. New York*, 422 U.S. 853, 862 (1975) (making reference to the criminal justice system’s “ultimate objective that the guilty be convicted and the innocent go free”).
  5. See, e.g., Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317 (1997).

In the project of which this paper is the first part, we will attempt an overview of what an “innocentric”<sup>6</sup> system would look like,<sup>7</sup> and what changes would be required to reform our current practices to come as close to such a system as possible. We approach this task with eyes open. In criminal procedure, most individual reforms, even the ones that should be least controversial, predictably face stiff opposition from one constituency or another that sees the reform as a lost advantage, or at least sees no advantage in the reform. Police and prosecutors may fear the loss of current practices which they perceive as useful for convicting those whom they believe to be guilty.<sup>8</sup> The defense bar may fear that some reforms will bring new disadvantages to the majority of their clients (the factually guilty ones) for the benefit of the innocent minority.<sup>9</sup> Those whose main interest is in the root-and-branch abolition of capital

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Factual accuracy is desirable, but as a Constitutional matter, hardly paramount. The Court’s most significant rulings in the Fourth and Fifth Amendment areas tend to reduce rather than increase the information available to the factfinder . . . [T]he Court has refused to concern itself with the obligations of the police or prosecutor to conduct a thorough investigation, to maintain comprehensive records, or even to choose wisely which potential defendants to charge. These matters—the very essence of a system concerned with actual innocence—are extra-constitutional.

*Id.* at 1370–71 (footnotes omitted). The perverse effect and tragic irony of constitutional guarantees injuring the factually innocent has been occasionally recognized in specific areas. *See, e.g.*, Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 861–64 (1995) (documenting this effect in regard to current constructions of the Fifth Amendment). The competing values of the criminal justice system reflected in U.S. Supreme Court opinions have been oft discussed. *See, e.g.*, Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts’ Competing Ideologies*, 72 GEO. L.J. 185 (1983).

6. “Innocentric” is the adjective form of the term “innocentrism,” which was coined by Daniel Medwed to connote an approach to criminal procedure that explicitly foregrounds exoneration of the factually innocent as a criminal justice value and privileges, at least to some degree, the exoneration of the factually innocent over other competing values. *See* Daniel S. Medwed, *Innocentrism*, 2008 U. ILL. L. REV. 1549.
7. A particularly useful work manifesting a similar concern for systemic reform, but differing significantly in some important respects, is GEORGE C. THOMAS III, *THE SUPREME COURT ON TRIAL: HOW THE AMERICAN JUSTICE SYSTEM SACRIFICES INNOCENT DEFENDANTS* (2008).
8. Stephen Saloom offers a sympathetic view of various actors’ resistance to change, borrowing from comments made by Manhattan District Attorney Cyrus Vance at a recent symposium.

[T]he crushing demands of peoples’ respective roles within the system do not encourage—and rarely allow—them as individuals to seek to alter the system. Prosecutors, defense lawyers, police and judges know what they know, and have to work their tails off to simply establish their version of the story and otherwise keep their end of the system working. So it’s hard to break out of the daily onslaught and say “I’m going to do it differently today. I’m going to tell the judge I’m not going to proceed with my cases because I haven’t taken the necessary time.” Or for the judge to say “From now on I’m going to take the time necessary to really appreciate what’s going on in each of these cases.” Or for the police officer to say “I don’t care if this is how we’ve always done things, I’m going to research and apply best practices in my own work.”

Stephen Saloom, *Adversaries as Allies: Joining Together to Prevent Criminal Injustice*, 73 ALB. L. REV. 1235, 1237 (2010).

9. The tension between “innocence people” and criminal defense attorneys has become the subject of explicit discussion. The general outline of the multi-centric tensions set out in the text was developed by

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punishment may fear that some reforms will derail such abolition efforts, as concerns about the execution of the factually innocent are reduced.<sup>10</sup> Others may believe that emphasis on factual innocence diverts attention from the normative miscarriages of harsh sentencing imposed upon defendants guilty of something less than would justify their sentence.<sup>11</sup> Still others may feel that emphasis on factual innocence demeans the value of procedures meant to protect all of society, including the guilty, from tyrannical use of power or from fundamental dignitary abuse.<sup>12</sup> Those whose main focus is giving crime victims “closure” may fear that some of the reforms may banish public fury from the trial of guilt in ways that disappoint the desires of victims.<sup>13</sup> Judges, who by definition have been successful players under the current system, may indulge the well-known human tendency to believe that the system in which they have been personally successful has virtues beyond those it appears to have when subjected to critical analysis.<sup>14</sup> Lawyers in general may indulge the quite common romantic notion that “our adversary system” is already the best of all possible

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one of us (Michael) during discussions with George Thomas and, later, Bob Mosteller, and was at least one impetus for Professor Mosteller’s recent published reflections on that tension. See Robert P. Mosteller, *Why Defense Attorneys Cannot, But Do, Care About Innocence*, 50 SANTA CLARA L. REV. 1, 32 n.44 (2010) (documenting discussions with D. Michael Risinger); see also, e.g., Medwed, *supra* note 6 (attempting a reconciliation of the conflicting views). The main objection of the criminal defense bar seems to be a signaling objection. If actual innocence is signaled in any way, failure to signal in other cases will in fact signal at least factual guilt. Again, the innocent are held hostage for the benefit of the guilty. For a discussion of such a signaling problem in the context of plea bargaining practice, see Russell D. Covey, *Signaling and Plea Bargaining’s Innocence Problem*, 66 WASH. & LEE L. REV. 73 (2009).

10. The tension between “innocence people” and “anti-death penalty people” has been apparent for awhile. See, e.g., D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 781–82 (2007) [hereinafter *Innocents Convicted*]; Carol S. Steiker & Jordan M. Steiker, *The Seduction of Innocence: The Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 J. CRIM. L. & CRIMINOLOGY 587 (2005).
11. See generally DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* 3 (2008); HARVEY A. SILVERGLATE, *THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT* (2009) (setting out an analysis of the prevalence of over-criminalization and over-punishment).
12. See, e.g., Emily Hughes, *Innocence Unmodified*, 89 N.C. L. REV. 1083, 1083–84 (2011) (analyzing “the degree to which the Court has reduced innocence to a binary—prioritizing actual innocence over fundamental protections for all people, including people who might be wrongly convicted if the courts do not safeguard their constitutional rights”). Professor Hughes counts as “innocent” those who are factually (and normatively) guilty as charged but who have been convicted in derogation of their procedural rights. See *id.* at 1089; see also Susan A. Bandes, *Protecting the Innocent as the Primary Value of the Criminal Justice System*, 7 OHIO ST. J. CRIM. L. 413 (2009) (reviewing THOMAS, *supra* note 7); Susan A. Bandes, *Framing Wrongful Convictions*, 2008 UTAH L. REV. 5; Mosteller, *supra* note 9, at 2; Margaret Raymond, *The Problem with Innocence*, 49 CLEV. ST. L. REV. 449 (2001).
13. For a treatment of many criminal justice issues from a victims’ rights perspective, see DOUGLAS E. BELOOF, PAUL G. CASSELL & STEVEN J. TWIST, *VICTIMS IN CRIMINAL PROCEDURE* (3d ed. 2010).
14. See the discussion of this phenomenon in the context of judicial abdication in the control of weak prosecution-proffered expertise in D. Michael Risinger, *Goodbye To All That or A Fool’s Errand, by One of the Fools: How I Stopped Worrying About Court Responses to Handwriting Identification (and “Forensic Science” in General) and Learned to Love Misinterpretations of Kumho Tire v. Carmichael*, 43 TULSA L. REV. 447, 473–74 (2007).

worlds,<sup>15</sup> reinforced by the Burkean notion that the unintended consequences of changing institutions hallowed by long practice are likely to be worse than simply pursuing business as usual.

We will deal with such concerns as we judge they may arise in regard to any given change espoused below. But in general, we think it appropriate at the outset to call on the members of all these “stakeholder” groups (as they appear to be called today) to recognize the special claims of another stakeholder group, that is, the convicted innocent (including the innocent who will be convicted if the proposed reforms are not undertaken). We call upon all constituencies to realize consciously and explicitly that, whatever other concerns are at stake, “innocence is different.”

Having said this, we want to make clear that we are not asserting that conviction of the factually innocent must be avoided at all possible costs whatsoever. We realize that the only way to accomplish this in a human system that must deal with a high volume of individual crimes would be to quit convicting anyone at all. This would obviously be too high a price to pay, and impose the costs of resulting uncontrolled crime on yet other innocents in society. However, we believe that all of the reforms we recommend in this article would result either in no costs in terms of lost convictions, or (at the most) only in losses of convictions that were epistemically indefensible anyway, in that the convictions were only randomly right. In addition, we believe that many of the reforms we recommend would in fact lead both to fewer convictions of the innocent and to more convictions of the guilty. The only “costs” involved in such reforms, money aside, are supposed dignitary interests of guilty persons, or dignitary and privacy interests of innocent persons, in being left alone. While we do not believe that such interests are necessarily trivial, we do believe that the reforms we propose would have only trivial impact, or none at all, on any important dignitary or privacy interests.

Finally, even if, as seems likely, the fundamental revamping we recommend has little chance of wholesale adoption anytime soon, the exercise is still justifiable as foundation-laying. It often takes a generation or two for reforms to move from unthinkable, to merely unacceptable, to things that should be considered, to things that should be done. In addition, a symposium like this one<sup>16</sup> allows us to begin a

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15. The tendency to thoughtlessly and uncritically invoke the virtues of “our adversary system” in response to calls for reform is well illustrated by the fact that as of February 11, 2011, this buzz phrase occurs in 2997 cases in the Westlaw ALLCASES (all federal and state cases) database (1945 to the present) and in 1654 articles in the Westlaw JLR (journals and law reviews) database (generally 1980 to the present). Professor Sklansky has recently skewered this attitude. See David Alan Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634 (2009). Professor Langbein has long argued that the adversary system, in his words, “had the effect of perpetuating the central blunder of the inherited system: the failure to develop institutions and procedures of criminal investigation and trial that would be responsible for and capable of seeking the truth.” JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* 343 (2003). For international perspectives on the weaknesses of the adversary system, see, for example, COSMAS MOISIDIS, *CRIMINAL DISCOVERY: FROM TRUTH TO PROOF AND BACK AGAIN* 126–45 (2008); Marvin Zalman, *The Adversary System and Wrongful Conviction*, in *WRONGFUL CONVICTION: INTERNATIONAL PERSPECTIVES ON MISCARRIAGES OF JUSTICE* 71 (C. Ronald Huff & Martin Killias eds., 2008).

16. Symposium, *Exonerating the Innocent: Pre-Trial Innocence Procedures*, 56 N.Y.L. SCH. L. REV. 825 (2011–12).

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dialogue both with those whose points of view are generally aligned with ours and with those whose viewpoints are not generally so aligned. We have points of difference with both, but we are convinced that reasonable people of good will on all sides can find common ground, and that progress toward more reliably protecting the innocent while convicting the guilty can be accomplished, slow though it may be. Reform to accomplish more just justice is always a long-haul process.

Of course, there is nothing novel in the realization that the conviction of an innocent person is a grave injustice, and indeed, that it is a greater injustice than allowing a guilty person to go free. The first glimmerings of such a moral principle can be seen thousands of years ago,<sup>17</sup> and the exact balance between necessary social control and risks to the innocent has been a topic of serious reflection in Anglo-American legal discourse for more than two centuries.<sup>18</sup> What is different today is the conclusion by a significant number of informed observers of the criminal justice system that conviction of the innocent is common enough to call for substantial systemic reforms to address the phenomenon.<sup>19</sup> Largely because of the work of the Innocence Project,<sup>20</sup> we have discovered that a non-trivial percentage of factually innocent people are convicted of serious crimes in the United States.<sup>21</sup> Even though there have been prominent voices in the past who called for serious reforms of various kinds to address what they considered to be too high a likelihood of convicting the innocent,<sup>22</sup> they were until recently voices crying in the wilderness. The DNA exonerations over the last two decades have provided more certainty about a

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17. See Alexander Volokh, n *Guilty Men*, 146 U. PA. L. REV. 173, 173–78 (1997) (tracing the notion to biblical roots, and giving examples from classical antiquity and the middle ages).
  18. For a précis of this history, see Risinger, *supra* note 10, at 763–66. For two recent reflections on these issues from very different perspectives, see Ronald J. Allen & Larry Laudan, *Deadly Dilemmas*, 41 TEX. TECH L. REV. 65 (2008) and D. Michael Risinger, *Tragic Consequences of Deadly Dilemmas: A Response to Allen and Laudan*, 40 SETON HALL L. REV. 991 (2010).
  19. References are legion. For a good selection, see Medwed, *supra* note 6. The following are some that are of particular importance: BARRY SCHECK, PETER NEUFELD & JIM DWYER, *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED* (2000); THOMAS, *supra* note 7; Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CALIF. L. REV. 1585 (2005); Keith A. Findley, *Toward a New Paradigm of Criminal Justice: How the Innocence Movement Merges Crime Control and Due Process*, 41 TEX. TECH. L. REV. 133 (2008); Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55 (2008); Richard A. Rosen, *Reflections on Innocence*, 2006 WIS. L. REV. 237. Also to be noted is Sam Gross's important and prescient article (unfortunately too often neglected), Samuel R. Gross, *Loss of Innocence: Eyewitness Identification and Proof of Guilt*, 16 J. LEGAL STUD. 395 (1987).
  20. For an account of the work of the Innocence Project since its creation by Peter Neufeld and Barry Scheck in 1992, and a list of the 272 DNA exonerations that have occurred as of June 20, 2011 (most resulting in whole or in part from their work), see INNOCENCE PROJECT, <http://www.innocenceproject.org> (last visited Oct. 17, 2011).
  21. See Risinger, *supra* note 10, at 786–88 (using a determinate set of DNA exonerations in capitally sentenced cases to establish a rate of 3.3% to 5% for conviction of the factually innocent in the type of crime involved in that set of cases (rape murders and, by extension, other analogous “nasty” murders)).
  22. See, e.g., EDWIN M. BORCHARD, *CONVICTING THE INNOCENT: ERRORS OF CRIMINAL JUSTICE* (1932); JEROME FRANK & BARBARA FRANK, *NOT GUILTY* (1957).



determinate set of cases and thus put to rest the notion that the conviction of the innocent is merely the occasional blip in an otherwise reliable system. Now that the empirical record makes it clear that there are almost certainly a non-trivial number of convicted innocent in many if not most categories of crime, reform proposals directed at protecting the factually innocent are no longer easily dismissed as addressing a merely theoretical problem.

This is not to say that past calls for this or that criminal procedure reform, whether to be accomplished through the medium of legislation or of judicial decision, have inevitably fallen on deaf ears. Criminal procedure today does not look exactly as it did in 1940, much less as it did in 1840. Indeed, it is common to speak of the criminal procedure “revolution” of the 1960s.<sup>23</sup> Some of these reforms have indeed helped the cause of the factually innocent. However, some of these “reforms” have not so clearly made things better for the innocent defendant charged with a crime.

At this point, we need to explain our general approach to dealing with so vast a subject within so small a compass. By necessity, much of what we will say will be an outline sketched to be elaborated in greater detail at another time. However, there are advantages to such a view from 30,000 feet. It may help to make clear certain connections that a more detailed (and much longer) account would perhaps obscure.

## II. FACTUAL INNOCENCE

The first topic we must deal with is the concept of factual innocence itself. Factual innocence as we conceive it applies only when the defendant is innocent of the crime charged either because he was not the actual perpetrator (and bore no accomplice responsibility) or because no crime was committed. All other circumstances that might result in an acquittal or diminution in the charge to a lesser offense do not present circumstances of factual innocence, but of normative innocence connected with value judgments usually concerning attributed states of mind. In another place, one of us has given a lengthy analysis about the necessity of distinguishing between these categories of factual guilt or innocence and moral guilt or innocence, and about their practical implications.<sup>24</sup> There are, of course, important “facts” to be determined

23. This is so well known as to pass without citation, but see, for example, CRAIG M. BRADLEY, *THE FAILURE OF THE CRIMINAL PROCEDURE REVOLUTION* 1 (1993) (“The ‘criminal procedure revolution’ refers to a series of constitutional decisions by the United States Supreme Court during the 1960s that ‘revolutionized’ the criminal procedures of the states.”); Donald A. Dripps, *The Fourteenth Amendment, the Bill of Rights, and the (First) Criminal Procedure Revolution*, 18 J. CONTEMP. LEGAL ISSUES 469 (2009) (referring to the Warren Court’s “criminal procedure revolution” of the 1960s as the “second criminal procedure revolution”; the first being the changes to criminal procedure in the nineteenth century that completely changed the criminal procedure that would have been familiar to the founding generation); Rosen, *supra* note 19, at 241 (raising the question as to how far the “criminal procedure revolution of the 1960s” could be said to have protected the innocent).

24. Risinger, *Unsafe Verdicts*, *supra* note 3, at 1290–1301. For a taxonomic discussion, see also Risinger, *Innocents Convicted*, *supra* note 10, at 762 n.2. This distinction is sometimes called the distinction between the questions of “actual” or “factual” innocence and “legal” innocence. See, e.g., Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 45–46 (1987); Givelber, *supra* note 5, at 1327 n.32. Before the “age of innocence” ushered in by the DNA exonerations, many commentators insisted on another type of “legal innocence,” i.e., the notion



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in both types of cases, and defendants in the latter type often need (but do not get) vigorous fact investigation and advocacy for a just resolution of their cases.<sup>25</sup> Many of the reforms discussed in this article would be useful to all such flavors and colors of innocence. But, as discussed in *Unsafe Verdicts*, we believe it is generally correct to say that cases of factual innocence usually turn on determinate binary decisions about one or two exterior facts in the world, such as whether the defendant was or was not present at the charged criminal episode; that the accurate determination of these facts benefits from highly controlled and structured trial procedures presenting the bare necessary minimum of “heartstrings and gore” type information, and that the defects of the adversary system are more likely to lead to the most serious type of injustice when the issue to be determined is such a yes-or-no factual issue.<sup>26</sup>

In general, we will organize our analysis of criminal procedure around three stages, pretrial, trial, and post-trial (including appeals), and, consistent with the theme of this symposium, this paper will deal primarily with the first. This mode of division is hardly novel, but we have especially strong reasons for adopting it as the right set of lenses for viewing the problem of the convicted innocent. The pretrial stage is the stage at which whatever information will be available to the trier of fact is gathered (or not gathered), is suppressed, malleated, massaged, and distorted (to the extent that such distortion is not guarded against), and is analyzed (or not) to present the record, information, and arguments concerning guilt or innocence to the trier of fact at trial. As a general proposition, the factually innocent have an interest in informational accuracy, completeness, and clarity emerging from this stage. Unfortunately, almost no other stakeholder shares that interest—certainly not the guilty defendant, and often not the prosecution or the police either. It is in the pretrial stage that the weaknesses of our inherited adversary system are most extreme and most apparent, and most in need of change to benefit the innocent. In addition, the pretrial stage is the stage at which many constitutionalized practices mandated by

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that all “rules of the game” have been observed in reaching a judgment, and, as previously noted *supra* note 12 and accompanying text, some continue to insist on this notion as the proper perspective. Professor Bandes has reviewed the literature and examined the issues of innocence “labeling” in great detail, asserting that policy responses to the DNA exonerations must take into account not only the moral power of actual, factual innocence, but also other kinds of innocence and justice claims. *See generally* Bandes, *Framing Wrongful Convictions*, *supra* note 12.

25. *See* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 *YALE L.J.* 1, 40 (1997). Professor Brown likewise points out that inaccurate adjudication affects both the actually innocent and the morally innocent or less culpable: “the risk of inaccuracy affects the guilty as well, because even guilty defendants can be inaccurately charged, adjudicated, and punished.” Brown, *supra* note 19, at 1596.
26. Normative innocence cases, on the other hand, usually do not turn on such binary exterior facts, can be more justly resolved with relatively loose “thick description” standards of proof presentation, can benefit from adversariness, and are properly entrusted to the normative warrant of the jury. *See* Risinger, *supra* note 3, at 1307–11. *Unsafe Verdicts* made what we believe was the first proposal for elective “innocence rules” at trial, one of which was to permit a person claiming “factual” innocence to isolate a binary fact issue, for example, the identity of the perpetrator, as the one to which proffered evidence must be relevant, and thereby exclude “heartstrings and gore” evidence that might unwarrantedly affect the jury’s verdict on the issue of actual innocence. *Id.* at 1311–12.

the Supreme Court are undertaken and litigated over in order to insure governmental compliance with such practices. One position that we will consider, and ultimately adopt at least to some extent, is that these constitutional protections have so distorted the process that they have undermined the interests of the factually innocent for the benefit of the guilty.<sup>27</sup>

The trial stage begins with the selection of the jury and ends with the rendering of the verdict. It is here that the strengths of the traditional adversary system are often most in evidence, especially in dealing with cases of normative (as opposed to factual) innocence. Nevertheless, many of our evidence rules and trial practices as they are commonly administered may benefit the prosecution of the guilty but unjustifiably disfavor the factually innocent.

Finally, the post-conviction stage is probably the stage most stacked against the factually innocent, by virtue of an unthinking commitment to finality that frustrates the identification of factually unsafe verdicts. Ironically, in regard to federal habeas corpus, a congressional desire to speed along the execution of capitally sentenced prisoners has had its most dramatic effects on non-capitally sentenced convicted innocents, even though none of the policies that might justify the AEDPA rules in the case of capital sentences apply very strongly if at all to non-capitally sentenced prisoners.<sup>28</sup>

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27. This theme was elegantly developed by Professor Stuntz in an article in which he lamented the incentives for defense attorneys to “skew their investment in the direction of more constitutional litigation and less litigation about the facts.” Stuntz, *supra* note 25, at 43. For reasons that will become a bit clearer below, we do not believe that the onus of investigating a defendant’s factual claims of innocence or mitigation should be only, or even mainly, on defense counsel.

28. AEDPA is the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in scattered sections of 18, 21, & 28 U.S.C.), which imposes strict jurisdictional and time limitations on district courts’ review of petitions for federal habeas corpus. One relevant oddity of the Act is that it contains substantial limitations and time bars applicable to federal habeas corpus jurisdiction. The main justification was to strip death-sentenced convicts (who have great motive for delay) of tools of delay, but this approach was applied universally to all convicts, even though most such convicts have little motive to delay proceedings that might result in relief. It is obvious that while capitally sentenced petitioners might “deliberately engage in dilatory tactics to prolong their incarceration and avoid execution of the sentence of death” and thus “frustrate AEDPA’s goal of finality by dragging out indefinitely their federal habeas review,” *Rhines v. Weber*, 544 U.S. 269, 277–78 (2005), an innocent, non-capitally sentenced prisoner usually has little or no incentive to do so, a fact also acknowledged by the Court in *Rhines*, 544 U.S. 269, 277–78 (“Though, generally, a prisoner’s ‘principal interest . . . is in obtaining speedy federal relief on his claims,’ not all petitioners have an incentive to obtain federal relief as quickly as possible. In particular, capital petitioners . . .” (first alteration in original) (quoting *Rose v. Lundy*, 455 U.S. 509, 520 (1982))). The fairness implications of these two categories of opposed motivation are monumental for the non-capitally sentenced convicted innocent, and are generally overlooked. Presumably, Congress could not stomach a rule explicitly applying only to the disadvantage of capitally sentenced prisoners (even though they are generally the only ones to whom the policy justifying the rule applies with any strength), and therefore applied it to the disadvantage of all prisoners as a kind of fig leaf. The effect is to deprive federal courts of any effective ability to vindicate the constitutional interests in freedom of the much larger set of non-capitally sentenced convicted innocent. Thus the tail has wagged the dog, to the severe detriment of the actually innocent.

## III. PRETRIAL PROCEDURES

Since the ratification of the Bill of Rights in 1791, patterns of crime have changed, modes of enforcement and investigation have changed, and the position of the average defendant charged with a serious crime has changed almost beyond recognition.<sup>29</sup> Some of these changes have benefited criminal defendants generally, but have had the least relative impact on innocent defendants. Some of these changes have been to the detriment of criminal defendants generally, but most of all, innocent defendants. Whichever way one cuts it, the Founding Fathers would barely recognize pretrial procedure in criminal cases as they exist today, and they would be profoundly shocked by some aspects of it. Take, for example, the way in which investigation of crime has been delegated to the police in the first instance, and then to prosecutors in coordination with the police—a process that often occurs largely in secret, and long before any charges are lodged. This is a pattern profoundly different from that which prevailed in the early federal period in any American jurisdiction. At that time there were no police agencies as we conceive of them,<sup>30</sup> and there may have been no public prosecutors with a dominant role in prosecuting, much less investigating, the majority of crimes in many American states.<sup>31</sup> Most importantly, a complainant in a felony case alleging

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29. As Professor Dripps has written:

The theory that the Fourteenth Amendment incorporates the Bill of Rights established the foundation for the Warren Court's "criminal procedure revolution." Long before the Warren Court, however, there had been another criminal procedure revolution. This first revolution worked slowly and incrementally, led throughout the nineteenth century by legislatures rather than by courts. It included an institutional, an intellectual, and a doctrinal component. When it was over—roughly speaking, around the turn of the nineteenth into the twentieth century—the founders' criminal justice system had been altered beyond recognition.

. . . .

The founders' criminal justice system was institutionally primitive, intellectually pragmatic, and doctrinally technical. The key institutional players were all amateurs. Citizens complaining about an offense would present their complaint, with or without the suspect in custody, to the justice of the peace. If the suspect were not present the jp would issue an arrest warrant, and sheriff or the posse would execute the warrant. Whether the suspect was arrested on a warrant or without one, the jp would examine the witnesses and the suspect (the suspect would not be sworn), and make a record of the depositions.

Dripps, *supra* note 23, at 470–71.

30. No police force as we now know it existed in either England or anywhere in the United States in 1793. See JEAN-PAUL BRODEUR, *THE POLICING WEB* 57–72 (2010). Police forces in the English-speaking world as we conceive them began with Sir Robert Peel's Metropolitan Police in London in 1829, and were the product of the middle third of the nineteenth century in the United States. *Id.* at 62–63.
31. The heavily qualified sentence in the text comes from the lack of clarity in the literature and the historical record. It is well known that in England in the eighteenth century, although prosecutions were formally brought in the name of the king, most ordinary criminal prosecutions were initiated and investigated by private parties acting as volunteer prosecutors. Occasionally, though, a justice of the peace or a parish officer might initiate an investigation and stimulate someone to prosecute, and crown officers would initiate prosecutions in special areas such as counterfeiting. The usual account for this state of affairs is that, like a professional police force, a public prosecutor was a French device to suppress

that a particular defendant was guilty of a felony was expected to bring that case, including whatever witnesses were known to the complainant, not to the public prosecutor, but before a justice of the peace, who took their statements and generally reduced them to writing. If the justice of the peace thought that a case to answer had been made out, the defendant was brought before the justice, who examined him and any witnesses he wished to proffer at that time. Thus, the common pattern made official interrogation a semi-public event (subject always to the right of the accused to refuse to answer any questions put by the justice of the peace),<sup>32</sup> and gave the criminal

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liberty, and therefore to be shunned. See ALLYSON N. MAY, *THE BAR AND THE OLD BAILEY, 1750–1850*, at 19–20 (2003); LANGBEIN, *supra* note 15, at 109–36. As a result of an extensive system of rewards paid upon conviction, the prosecutor was usually, but not always, the crime victim or a relative of the victim. Not uncommonly it was merely someone acting in what they took as the public interest or someone seeking the reward. See J. M. BEATTIE, *CRIME AND THE COURTS IN ENGLAND 1660–1800*, at 50–59 (1986). This system (sans the rewards) actually continued in existence in theory until quite recently, although with the establishment of the Metropolitan Police and similar county constabularies, the police actually took over the role of initiating prosecution. See D. Michael Risinger, *Boxes in Boxes: Julian Barnes, Conan Doyle, Sherlock Holmes and the Edalji Case*, 4 INT'L COMMENT ON EVIDENCE, no. 4, issue 2, art. 3, 2006 at 37–38 n.145.

If a similar pattern had been followed in the colonies and in the states during the early post-colonial period the modern prosecutorial arrangements would have been strange indeed to the founders. However, there is reason to believe that at least some of the colonies were more open to accepting a public prosecutor with the general responsibility of prosecuting ordinary crime than was the case in England. For instance, by examining the extant partial records of the New Jersey Court of Oyer and Terminer in the mid-1700s, Professor Thomas has shown that most felony prosecutions were prosecuted by the Attorney General of the colony. George C. Thomas III, *Colonial Criminal Law and Procedure: The Royal Colony of New Jersey 1749–57*, 1 N.Y.U. J.L. & LIBERTY 671, 688–90 (2005). Similar arrangements seem to have prevailed in New York and probably in Pennsylvania and elsewhere. See JULIUS GOEBEL JR. & T. RAYMOND NAUGHTON, *LAW ENFORCEMENT IN COLONIAL NEW YORK: A STUDY IN CRIMINAL PROCEDURE (1664–1776)* (1970), for a discussion of New York. For Pennsylvania, see, for example, CORRECT ACCOUNT OF THE TRIALS OF CHARLES M'MANUS, PATRICK DONAGAN, JOHN HAUER, FRANCIS COX, ELIZABETH HAUER, AND OTHERS; FOR THE MURDER OF FRANCIS SHITZ (Harrisburgh, John Wyeth 1798) (prosecution conducted by attorney for the state of Pennsylvania).

So a general office of public prosecutor seems to have been an American innovation as far as the English-speaking world is concerned. However, we are still without any good notion of whether this pattern prevailed in all thirteen original states, or exactly how complaints were asserted and investigations conducted in the earliest period. For instance, even in the first decade of the nineteenth century, the district attorney in New York appears to have functioned mainly as an aid to private prosecutors and to have had a limited investigatorial role, with the bulk of the responsibility still falling upon the private prosecutor. See Mike McConville & Chester Mirsky, *The Rise of Guilty Pleas: New York, 1800–1865*, 22 J.L. & Soc'y 443, 448–50 (1995). Records that would shed light on all these issues across all colonies and early states are sparse. Later New York records show an increasing investigatory role for constables under the coordination of a judicial officer, the Special Justice. See MIKE MCCONVILLE & CHESTER L. MIRSKY, *JURY TRIALS AND PLEA BARGAINING: A TRUE HISTORY* 59–71 (2005).

32. The history of the examination of the defendant by a magistrate in English and American practice is long, complicated, subject to substantial evolution over time, and subject to substantial debate by historians over details, owing in large part to the incompleteness of records concerning actual normal practice even as late as the first half of the nineteenth century. All records appear to be agreed that magistrates (justices of the peace) were charged with questioning and taking down the “material” parts of the statements both of witnesses against the alleged perpetrator and also of the alleged perpetrator himself, very early in the process. This procedure was mandated by the “Marian” statutes on pretrial procedures, passed in the 1550s during the reign of Mary Stuart, but whether these proceedings were

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defendant access to a great deal of discovery concerning the contours of the case alleged against him. This continued to be the case in most American jurisdictions throughout the first half of the nineteenth century. Consider the following, from an 1829 justice of the peace manual in a jurisdiction now renowned for its lack of proper discovery procedures, that is, New York:

When a complaint is made to a Justice, that a criminal offence has been committed, it is his duty to examine, on oath, the complainant, and any witnesses who may be produced by him. The statute does not, in terms, require, that the examination of the complainant and his witnesses, in this incipient proceeding in the prosecution, should be reduced to writing; but, in conformity to practice, as well as to ensure greater safety and regularity in the proceedings, it should be done.

Usually witnesses are not produced by the complainant at the time of his application for a warrant, his own oath only being taken. In such a case, his examination may be reduced to writing in the common form of a complaint.

If the complainant produce witnesses, a general memorandum of the testimony of the complainant and the witnesses, may be made and signed by them.

If it appears from such examination, that a criminal offence has been committed, the Justice must issue a warrant, reciting the accusation and commanding the officer to whom it is directed, forthwith to take the person accused, and to bring him before such Justice, to be dealt with according to law.

The person accused when arrested must be taken before the Justice who issued the warrant; or, if he be absent, or his office be vacant, before the nearest magistrate of the same county. The officer making the arrest must endorse and sign a proper return on the warrant, and deliver it to the Justice.

The next proceeding is the examination of the complainant, and the witnesses in support of the prosecution. They must be examined on oath, in the presence of the prisoner, in regard to the offence charged, and in regard to any other

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codifications of indigenous English practices or “Continental imports” can still be a subject of some debate. Compare Thomas G. Barnes, *Examination Before a Justice in the 17th Century*, in 27 NOTES & QUERIES FOR SOMERSET AND DORSET 39–42 (T. J. Hunt & Philip N. Dawe eds., 1955) (a “Continental import”), with JOHN LANGBEIN, PROSECUTING CRIME IN THE RENAISSANCE: ENGLAND, GERMANY, FRANCE 64–97 (1974) (citing and quoting Barnes, but concluding that the Marian statutes were codifications of pre-existing English practice). Whatever the truth, two hundred years of practice and adjustment had rendered the procedure a thoroughly domesticated fixture of criminal practice both in England and the early United States at the end of the eighteenth and beginning of the nineteenth centuries. By the late eighteenth century, in both countries, magistrates conducting examinations of alleged perpetrators both allowed counsel to appear for the accused, and, with or without counsel, cautioned the accused that he was not obliged to make any statement and that any statement made would be taken down and might be used against him at trial. As in our own time, the caution was a solvent that washed away concerns expressed by judges at an earlier time concerning whether, and under what kinds of questioning, the statement should be counted as voluntary enough for use at trial. See the excellent review and exposition in Wesley MacNeil Oliver, *Magistrates’ Examinations, Police Interrogations, and Miranda-Like Warnings in the Nineteenth Century*, 81 TUL. L. REV. 777, 784–92 (2007).

pertinent matters connected with the charge. The evidence given by the several witnesses must be reduced to writing, and signed by the witnesses respectively.

The Justice must then proceed to examine the prisoner in relation to the offense charged. The examination must not be on oath; and before it is commenced, the prisoner must be informed of the charge made against him, and allowed reasonable time to send for and advise with counsel. If desired by the person arrested, his counsel may be present during the examination of the complainant and the witnesses on the part of the prosecution, and during the examination of the prisoner.

At the commencement of the examination, the prisoner must be informed by the Justice, that he is at liberty to refuse to answer any questions that may be put to him.

The answers of the prisoner to the several interrogations must be reduced to writing, by the Justice, or under his direction; they must be read to the prisoner, who may correct or add to them; and when made conformable to what he declares is the truth, must be certified and signed by the Judge.

The witnesses produced on the part either of the prisoner or the prosecution, must not be present at the examination of the prisoner.

After the examination of the prisoner is completed, his witnesses, if he have any, must be sworn and examined, and he may have assistance of counsel in such examination. The testimony of the witnesses must be reduced to writing by the Justice, or under his direction, and signed by the witnesses respectively . . .

If upon the examination of the whole matter, it shall appear to the Justice, either that no offence has been committed by that person, or that there is no probable cause to believe the prisoner to be guilty therewith, he must discharge the prisoner.

If it shall appear that an offence has been committed, and that there is probable cause to believe the prisoner to be guilty thereof, the Justice must bind, by recognizance, the prosecutor and all the material witnesses against the prisoner, to appear and testify, at the next court having cognizance of the offence, and in which the prisoner may be indicted.<sup>33</sup>

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33. THOMAS G. WATERMAN, *THE JUSTICE'S MANUAL: OR, A SUMMARY OF THE POWERS AND DUTIES OF JUSTICES OF THE PEACE IN THE STATE OF NEW-YORK* 204–08 (Albany, Websters & Skinners, 2d ed. 1829) (forms set out in text omitted). This procedure was typical of early practice in the United States. As Professor Dripps has said:

The preliminary examination in English law arose from the so-called Marian statutes, the bail statute of 1554-1555 and the committal statute adopted in 1555. The seminal study of these statutes and the practice under them is John H. Langbein, *Prosecuting Crime in the Renaissance* (1974). For the text, and context, of the statutes themselves, see *id.* at 5-20. The leading study on the preliminary examination in the American colonies and the early United States is Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 Mich. L.



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Over the last thirty years or so, there have been calls by various people, notably Professors Langbein and Weinreb, for the general adoption of a Continental model of something like a *juge d'instruction* "adapted to our circumstances" to oversee investigation and discovery in criminal cases.<sup>34</sup> These calls have been met with resistance at least in part by virtue of the claimed foreignness of such a model, and its inconsistency with "our adversary system" as we inherited it from the English and as we practiced it at the time of the founding.<sup>35</sup> It will be observed from the quoted material above that such objections are in large part nonsense. We had a perfectly good functional model of a kind of investigating magistrate (the justice of the peace) at the founding, which lasted in most jurisdictions until just before the Civil War, and which is still to be found, in truncated form, in American jurisdictions such as California and New Jersey, among others.<sup>36</sup> We too, will be calling for the institution

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Rev. 1086 (1994). Moglen's close examination of [justice of the peace] manuals throughout the colonies shows that the examination procedure was well-established in the colonies, and survived the adoption of both state and federal constitutions in the new United States, see, e.g., *id.* at 1098.

Dripps, *supra* note 23, at 471 n.2. There is good reason to believe that these procedures were theoretically similar in form for rich and poor alike, but in fact functioned in practically different ways depending on the wealth and status of the defendant. Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 MICH. L. REV. 1086, 1108–11 (1994). The "supervised discovery" effect was probably only available to defendants with sufficient resources to afford counsel early in the process. Nevertheless, these "political classes" of the federal period would almost certainly be surprised at the blind manner in which they would be required to proceed were they charged in many American courts today.

34. John H. Langbein & Lloyd L. Weinreb, *Continental Criminal Procedure: "Myth" and Reality*, 87 YALE L.J. 1549, 1550 (1978). See generally LLOYD L. WEINREB, DENIAL OF JUSTICE: CRIMINAL PROCESS IN THE UNITED STATES 117–46 (1977); Gene D. Cohen, *Comparing the Investigating Grand Jury with the French System of Criminal Investigations: A Judge's Perspective and Commentary*, 13 TEMP. INT'L & COMP. L.J. 87, 105 (1999) (concluding that "[t]he French model of criminal investigations can be considered superior to the American jury system in many ways"); Langbein & Weinreb, *supra*. Similar calls have been recently renewed by Professor Thomas. See THOMAS, *supra* note 7, at 193–206. For a measured, rather than knee-jerk, response to Professor Thomas's recent proposals that we should borrow from Continental systems, see Bandes, *Protecting the Innocent*, *supra* note 12.
35. See, e.g., Sklansky, *supra* note 15 (demonstrating that Continental-style procedures tend to be labeled "inquisitorial" by Americans, evoking unjustified knee-jerk opposition). He argues that the evaluation of reform proposals "should not rest on the assumed superiority of the adversary system or the 'pejorative aura' surrounding the term 'inquisitorial.'" *Id.* at 1687 (citing MIRJAN R. DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY 88 (1986)). On the shibboleth of "our adversary system," see *supra* note 15.
36. Descendants of the justice of the peace procedures still exist in many modern American jurisdictions, mostly in vestigial form. This general circumstance was already the case by the early 1930s. See Paul G. Kauper, *Judicial Examination of the Accused—A Remedy for the Third Degree*, 30 MICH. L. REV. 1224 (1932). "The preliminary examination is today an innocuous proceeding. Professor Moley declares, 'Nearly everyone in the system believes the preliminary hearing to be practically unnecessary . . . . The prosecution views the preliminary hearing as a mere perfunctory detail.'" *Id.* at 1238 (alteration in original) (quoting RAYMOND MOLEY, OUR CRIMINAL COURTS 31 (1930)). However, modern "preliminary hearing" practice varies greatly, from the elaborate California process seen by the entire country in the O.J. Simpson and other celebrity cases, to much truncated versions in places like New Jersey to no such mechanism in practice in most cases in most counties in New York including New York City. See SYLVIA B. PRESSLER & PETER G. VERNIERO, CURRENT RULES GOVERNING THE COURTS



of the supervising magistrate; not one founded on a foreign model, but one modeled on the wholly Anglo-American model of the justice of the peace, revitalized and adapted to modern conditions. Our theme in this regard will be “back to the future.”

Speaking of back to the future, there is another judicial officer even more ancient than the justice of the peace whose role can be revitalized, repurposed, and combined with that of the justice of the peace to insure proper neutral supervision of the process of criminal investigation. We are referring to the coroner. Contrary to popular impressions, coroners were not agents making medical decisions, but judges.<sup>37</sup> When medical information was needed they could call for it, but the issues presented to them were primarily issues of ordinary fact. They were judicial officers with a narrow but important jurisdiction: the determination concerning whether suspicious deaths were from natural causes, or were homicides, whether suicide or by the hand of another.<sup>38</sup> Homicide was viewed as the ultimate crime, one of the few that called for organized official investigation even when no perpetrator had been identified by the private investigation of the injured party. Whenever a suspicious death occurred, the coroner was supposed to assemble a jury to investigate the circumstances.<sup>39</sup> Note that in this instance we find judicial involvement in investigation of a crime before a suspect is identified, and before sufficient evidence for a charge is assembled. Indeed, the coroner and his jury had not only the power of investigation, but also had the power of presentment. A charge against a person for homicide voted by the coroner’s jury was an alternative, indeed the main alternative, to indictment by a grand jury for levying a

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OF THE STATE OF NEW JERSEY, WITH COMMENTS AND ANNOTATIONS §§ 3:3-1(b)(1) & 3:4-3 (2012); KIMYETTA ROBINSON, *FROM ARREST TO APPEAL: A GUIDE TO CRIMINAL CASES IN THE NEW YORK STATE COURTS* 15 (2005). Note that although California preliminary hearing practices continue to be among the most extensive in the country—see the preliminary hearing in the case of Dr. Conrad Murray, charged with involuntary manslaughter in the death of Michael Jackson; for transcripts of the six-day preliminary hearing, see *Preliminary Hearing for Conrad Murray January 2011*, THE TRUTH ABOUT MJ, <http://www.thetruthaboutmj.com/2011-Dr-Murray-Trial-Transcripts.html> (last visited Oct. 17, 2011)—such hearings are not legally required to be as extensive as they used to be before 1990 when hearsay was generally inadmissible. See Breann Marie Handley, *Codifying the Status Quo: Chapter 18 Admits Retired Officer’s Hearsay Testimony at Preliminary Hearings*, 37 MCGEORGE L. REV. 273, 274–75 (2006).

All that appears to be required to satisfy the U.S. Constitution is a finding of probable cause in the event bail is not granted or made, pursuant to *Gerstein v. Pugh*, 420 U.S. 103 (1975), which finding can be based entirely upon documentary hearsay. A full comparative treatment is beyond the scope of this article, except to say that no American jurisdiction has a mechanism of judicial supervision of investigation such as the one that we propose.

37. Coroners were automatically justices of the peace, with further specific judicial functions as well as some administrative functions. See JOHN JERVIS, *PRACTICAL TREATISE ON THE OFFICE AND DUTIES OF CORONERS* 21–26 (London, S. Sweet, R. Pheny, A. Maxwell & Stevens & Sons, Law Booksellers & Publishers 1829). By far the most important function of the coroner in late seventeenth and early eighteenth centuries was holding inquests in cases of suspicious death. *Id.* at 21.
38. See *id.* at 21–25.
39. *Id.* at 26. All of the colonies utilized the inquest procedure. BRADLEY CHAPIN, *CRIMINAL JUSTICE IN COLONIAL AMERICA, 1606–1660*, at 35 (1983).

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charge of felony upon which a person could be tried.<sup>40</sup> But the main function of the coroner and his inquest was not as a charging body, but as an investigative body. The coroner had the power to summon witnesses, and was required to make a near verbatim transcript of the proceedings over which he presided when inquiring about a suspicious death.<sup>41</sup> As Sir John Jervis observed in 1829:

The Coroner's inquest is to ascertain truly the cause of the party's death, and is rather for information of the truth of the fact, than for accusation; it is not so much an accusation on an indictment, as an inquest of office to inquire truly how the party came to his death.<sup>42</sup>

Finally, the product of the coroner's inquest was a publicly available record, unlike any record kept of grand jury proceedings.

And speaking of the grand jury, and its role in the administration of criminal justice, the grand jury in American jurisdictions in the federal period seems to have been almost as pro forma as it was in England in cases of ordinary crimes committed by those without either wealth or status. Grand juries in England regularly met to consider presentments for indictment during the assize session where the case was to be tried, often the day before the case was in fact tried.<sup>43</sup> It is true that the founders considered the grand jury a sufficiently important popular check on political prosecution (or prosecution founded only upon speculation which had managed to make it past the magistrate's decision) to require indictment by a grand jury for any serious federal criminal charges. But the heyday of the grand jury, with its secret rather than public reception of testimony, as the cat's paw of a public prosecutor with a monopoly on prosecution, lay in the future.<sup>44</sup>

The point here is that the practical elimination of judicial involvement in overseeing investigation, together with modern arrangements allowing for only severely restricted discovery, are products of the mid- to late-nineteenth century. They are not part of "our adversary system" as it existed at the founding of the republic. Nor is our current version of an adversary system conducted in a manner calculated to obtain the benefits theoretically associated with a real adversary mode of uncovering and testing all available information. The police, and then the prosecution in cooperation with the police, have a monopoly on information gathering and assembly (*vel non*) in secret until a charging decision is made. By the

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40. See JOHN H. BAKER, *THE LEGAL PROFESSION AND THE COMMON LAW* 264 (1986). We need not tarry over the other alternatives to the grand jury, the sheriff's tourn and the court leet, which were virtually obsolete by the end of the eighteenth century.

41. JERVIS, *supra* note 37, at 30–31.

42. *Id.* at 30.

43. See LANGBEIN, *supra* note 15, at 43–45.

44. While there are some early common law sources that support a general power of investigation, the current arrangement in the United States concerning "special" or "investigating" grand juries seems to be almost entirely a product of nineteenth century statute. See David C. Toomey, *Discretionary Power in the Judiciary to Organize a Special Investigating Grand Jury*, 111 U. PA. L. REV. 954 (1963). This development appears to be the growth of a very large oak from a very tiny acorn; a tree the founding generation would have been unlikely to anticipate or to recognize in its full growth.

time any effective adversary involvement comes about, the most important part of the case is often (or even usually) over.

This is not to say that the design of proper new arrangements is merely a matter of resurrecting the justice of the peace and the coroner as they existed in 1800. Our theme is back to the future, not back to the past. We have told the story so far to show that there are perfectly respectable American (not French, not Continental) historical precedents for what we will recommend. The precedents do establish, however, that the general functions of broad discovery and early judicial involvement in criminal investigations are not foreign to our foundational jurisprudence. Updated arrangements, of course, would have to take into account modern conditions. As the reader will see, one specific difference between our proposals and those that have come before is the specific provision both for early involvement of adversary representation and for the handing off of primary responsibility for the process to the adversary parties once the primary investigation is concluded and a charging decision is undertaken. This separates our proposal from traditional Continental models, and answers, at least to a great degree, critics who might claim that investigating magistrates will institutionally become nothing more than prosecutors with the title “judge.”<sup>45</sup> It also harnesses the positive power of adversarialism where it makes most sense, and removes it from those functions where it makes least sense.

The main circumstances that must be taken into account are the very ones that led to the new arrangements in the first place—urbanization and frontier migration, the resultant breakdown of the informal means of social control typical of settled rural and village life, the need for effective police agencies in an increasingly urbanized environment, the rise of the urban and even extra-urban organized criminal enterprise, the need for secrecy in some types of investigation, the legitimate need to protect witnesses from intimidation, and the need for a public prosecutor with sufficient resources to process the increased volume of prosecutions that results from modern policing. We will of course not recommend dismantling the police, though we may consider the advisability of a radical restructuring in which patrol functions and detective functions are performed by institutionally separate agencies. We will of course not recommend the abolition of the public prosecutor, although we will recommend many changes to eliminate the monopoly currently held by the police and prosecutor over the gathering and shaping of evidence, which defeats much of the purpose of harnessing adversarialism as a mechanism for truth. And we shall be mindful of the need both to protect witnesses and to insure that their information is available to the trier of fact at trial, while at the same time insuring access by the defense to witnesses sufficiently in advance of trial to enable the defense to digest and follow up on their information. Only then will the benefits of legitimate adversarialism be secured.

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45. It has been said that the French investigating magistrate tends to adopt the attitudes of police and prosecutor. See Bandes, *Protecting the Innocent*, *supra* note 12, at 424–25 (citing JACQUELINE HODGSON, *FRENCH CRIMINAL PRACTICE: A COMPARATIVE ACCOUNT OF THE INVESTIGATION AND PROSECUTION OF CRIME IN FRANCE* (2005)).

## IV. DISCOVERY

Much of what we have just said applies to the criminal process across the board, whether one is dealing with defendants who are innocent or guilty. It is undoubtedly true that some practices unfairly undermine the legitimate interests of all defendants. Lack of access to relevant information is one of them. This may account for the fact that criminal discovery reform has received fairly broad support in the last decades,<sup>46</sup> although the failure to accomplish such reform in many jurisdictions, such as New York, attests to the continued view of most prosecutors that there is nothing in it for them, and to the power of prosecutors' lobbies generally.<sup>47</sup> The lack of early and complete discovery disfavors the factually innocent far more than any other set of defendants, since the factually innocent defendant usually begins the process with no background information on the underlying crime at all, unlike factually guilty defendants, who do not need discovery to tell them about the main facts of the case.<sup>48</sup>

And the Supreme Court has in this regard failed to go nearly far enough. *Brady*<sup>49</sup> and its progeny<sup>50</sup> are an improvement over no constitutionalization at all of the prosecutor's obligation to share information. But limiting that obligation to "material exculpatory" information, and leaving the determination concerning what is both "exculpatory" and "material" to the judgment of the prosecutor in the first instance, has created notorious problems.<sup>51</sup> Factually innocent defendants need far more informational completeness, at a far earlier time than is provided for by mere application of the *Brady* doctrine, to make up for what is (usually) their total lack of knowledge of the circumstances of the charged crime. It is understandable, perhaps, that the Supreme Court was reluctant to impose full information-sharing obligations

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46. The modern movement for discovery reform can probably be in part attributed to the publication of William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U. L.Q. 279, 292 (1963). See Steven H. Goldberg, *What Was Discovered in the Quest for Truth?*, 68 WASH. U. L.Q. 51, 51 (1990). An astonishing variety of discovery practices can be found among the fifty states. See JOHN SCHOEFFEL, CRIMINAL DISCOVERY REFORM IN NEW YORK: A PROPOSAL TO REPEAL C.P.L. ARTICLE 240 AND TO ENACT A NEW C.P.L. ARTICLE 245, at 1–3, 7 (2009), <http://www.legal-aid.org/media/73762/proposal%20for%20discovery%20reform%20in%20new%20york.pdf> (surveying discovery practices throughout the United States).

47. For instance, discovery reform has gone nowhere in New York, despite gargantuan efforts. See, e.g., Ellen Yaroshefsky, Foreword, *New Perspectives on Brady: What Really Works?*, 31 CARDOZO L. REV. 1943 (2010) (describing a recent attempt to accommodate prosecutors' views in working groups to discuss liberalizing disclosure).

48. The "factually guilty" in the general sense do, however, need discovery to know how to meet the prosecution's case, especially in circumstances where they have been overcharged and where strong normative defenses are available to defend against the top counts of the indictment.

49. 373 U.S. 83 (1963).

50. Most particularly, *Giglio v. United States*, 405 U.S. 150 (1972) (holding that evidence impeaching prosecution witnesses is "exculpatory" within the meaning of *Brady*).

51. See, e.g., Cynthia E. Jones, *A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence*, 100 J. CRIM. L. & CRIMINOLOGY 415 (2010); Andrew Smith, *Brady Obligations, Criminal Sanctions, and Solutions in a New Era of Scrutiny*, 61 VAND. L. REV. 1935, 1943–44 (2008). See generally Bennett L. Gershman, *Litigating Brady v. Maryland: Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531 (2007).

on the prosecution. It probably felt that it would not be right to do so when it could not impose similar reciprocal obligations on the defense, in the face of constitutional objections to compelling at least some forms of discovery from criminal defendants. We believe, however, that there is no valid constitutional objection to a view of due process that mandates that the prosecution must offer full reciprocity—that is, that due process obliges the prosecution to offer full disclosure reciprocal on defendant’s complete or near-complete waiver of any constitutional rights to hold back information.<sup>52</sup> That would leave the option to retain or escape “trial by ambush” in the hands of the defense, an option that most innocent defendants would gladly resolve in favor of reciprocal discovery. In fact, such reciprocal waivers are the key to making such discovery schemes work in those jurisdictions, such as New Jersey, that have successfully adopted so-called “open file” discovery practices.<sup>53</sup> Indeed, the utility of such waivers, as a condition to the provision of more “truth conducive” procedural options generally, is a key feature of any attempt at designing actual innocence procedures that have even a remote chance of adoption.

So we, like many others before us, call *at the very least* for discovery reform, including the adoption of reciprocal so-called “open file” discovery, such as the system in New Jersey, and, in addition, the criminal deposition process that exists in a few jurisdictions such as Florida and Iowa.<sup>54</sup> This would return to modern practice a version of defense access to witnesses’ versions of the facts, which was regularly available in the justice of the peace procedures of the early republic. These arrangements, combined with early availability of judicial procedures to protect witnesses from intimidation, have worked without serious problems in jurisdictions not normally thought of as sleepy, low-crime jurisdictions. Indeed, the deposition process can provide the best possible protection against witness intimidation, as long as the depositions are usable at trial, since they much reduce what can be gained by intimidation. There are, of course, wisely or unwisely, potential confrontation problems with such an arrangement,<sup>55</sup> but we think (once again) that reciprocity and

52. Professor Mosteller set forth the contrary view in Robert P. Mosteller, *Discovery Against the Defense: Tilting the Adversarial Balance*, 74 CALIF. L. REV. 1567, 1569–70 (1986); see also Cameron J. Williams, Note, *Sidestepping Scott: Modifying Criminal Discovery in Alaska*, 15 ALASKA L. REV. 33 (1998) (explaining the Alaska state constitutional right of silence, which apparently forbids requiring a defendant to provide information about even an alibi defense before trial under *Scott v. State*, 519 P.2d 774, 778 (Alaska 1974), and proposing an opt-in reciprocal discovery model, which is the model in many states).

53. See SCHOEFFEL, *supra* note 46, at 2. Dr. Moisisdis makes the complete case for full, reciprocal pretrial discovery. See MOISISDIS, *supra* note 15.

54. See, e.g., FLA. R. CRIM. P. 3.220 (2011); IOWA CODE R. 2.14 (2011). Resistance to depositions in criminal cases has a long history. See, e.g., *Depositions in Criminal Cases*, N.Y. TIMES, Apr. 16, 1883, <http://query.nytimes.com/mem/archive-free/pdf?res=F07012F9E5411738DDDAF0994DC405B8384F0D3>.

55. Or perhaps not. When we first wrote this, the contours of the obligations of the Confrontation Clause of the U.S. Constitution pursuant to *Crawford v. Washington*, 541 U.S. 36 (2004), would seem to suggest such problems absent election and waiver, since such statements would appear to be clearly “testimonial” as that term is used (or misused) in *Crawford*, unless cross-examination rights and incentives that would be the practical equivalent of such rights and incentives at trial were provided. However, as we were finishing this draft, the Supreme Court’s decision in *Michigan v. Bryant*, 131 S. Ct. 1143 (2011), came down and threw the hard-edged framework of *Crawford* into disarray. Clarification must await the future.

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waiver, coupled with robust rights of cross-examination, can provide a solution to any such problems.

We are mindful, however, that proper discovery practice, in the context of other current institutional arrangements, cannot cure all of the serious special problems of the innocent defendant. Given the almost complete control over investigation exercised by police and prosecutors,<sup>56</sup> the manner in which witnesses are influenced to conform their statements to law enforcement expectations,<sup>57</sup> and the gross imbalance in resources between prosecution and defense,<sup>58</sup> discovery alone cannot begin to accomplish justice for the innocent. Too many injustices have occurred as the result of the structural distortions built into the current version of “our adversary system,” in regard to the exclusively partisan gathering and massaging of information. This process heavily favors the prosecution because the prosecution has more resources, and will in the course of events, through its police agencies, have earlier and more effective access to sources of relevant information—a situation that especially disfavors the factually innocent. Even full discovery will often come at a point where it is too late.

For example, full discovery would have done nothing for Jeffrey Deskovic in regard to the most damning piece of evidence against him—the fact that during police interviews he accurately drew a sketch of the crime scene and demonstrated other knowledge of the details of the crime, details which (the prosecutor insisted at trial) only the perpetrator could have known.<sup>59</sup> Deskovic was convicted at trial on the

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56. See, e.g., James Q. Whitman, *Equality in Criminal Law: The Two Divergent Western Roads*, 1 J. LEGAL ANALYSIS 119, 130 (2009) (elaborating on his claim that in the pretrial phases up to and including charging decisions, “Americans allow prosecutors degrees of discretion that are unparalleled in the advanced democratic world.”). It seems to us that unfettered prosecutorial control over the pretrial phases, including the gathering and manipulation of evidence, creates significant dangers for the innocent. An important article on the constitutional implications of this problem is Note, *Toward a Constitutional Right to an Adequate Police Investigation: A Step Beyond Brady*, 53 N.Y.U. L. REV. 835 (1978).

57. See Stanley Z. Fisher, “Just the Facts, Ma’am”: Lying and the Omission of Exculpatory Evidence in Police Reports, 28 NEW ENG. L. REV. 1, 2–4 (1993). See generally Adrian A.S. Zuckerman, *Miscarriages of Justice—A Root Treatment*, 1992 CRIM. L. REV. 323 (1992) (arguing that miscarriages of justice are to be attributed to faulty police investigation).

58. “[T]he imbalance is so pervasive in the United States that it might be treated as a structural error.” Zalman, *supra* note 15, at 80.

59. The Deskovic case is a disturbing example of multiple failures of the criminal justice system, most prominently the use of police interrogation methods that are highly likely to break the will of innocent but emotionally vulnerable suspects. The following synopsis is derived from LESLIE CROCKER SNYDER ET AL., REPORT ON THE CONVICTION OF JEFFREY DESKOVIC (2007), <http://www.westchesterda.net/Jeffrey%20Deskovic%20Comm%20Rpt.pdf>.

Jeffrey Deskovic was a sixteen-year-old high school student whose classmate, Angela Correa, had been raped, strangled, and left in a wooded hollow in Peekskill, New York, on November 15, 1989. Police attention was drawn to Mr. Deskovic because he had allegedly been absent from school at the time in question, had attended all three wakes, had been very distraught over Angela’s death, and showed what they regarded as an unusual eagerness to assist in the investigation. Police conducted numerous interviews with Mr. Deskovic over a period of many weeks, some of them lasting for hours, and many of them not recorded. On January 25, 1990, at around 9:30 a.m., Mr. Deskovic arrived alone at police headquarters to voluntarily submit to a polygraph. He was subjected to confrontational



basis of a false confession, and later exonerated with DNA evidence. In a post-exoneration report, prepared at the request of the Westchester County district attorney, the authors came to no conclusion about how Mr. Deskovic had come into possession of the information he had provided in his sketch and statements, but they recognized that the police must have conveyed the information outside of their inner circles.<sup>60</sup> Once this happened, and once the police persuaded themselves that Mr. Deskovic had not obtained the information from a source other than personal knowledge, “open-file discovery” could not have helped Mr. Deskovic. The evidence that had already been gathered against him by the time “discovery” was made was both damning and false. Only different investigatory procedures could have prevented this conviction.<sup>61</sup>

Likewise, discovery for Leonard McSherry would at best have resulted (and in fact did result, given California’s pretrial scheme of discovery and preliminary

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questioning before allegedly failing the polygraph, and many hours later, after further interrogation, he confessed to killing Angela and collapsed on the floor in a fetal position. The prosecutor would later argue to the jury and to the appellate court that Mr. Deskovic’s knowledge of details of the crime that could only be known to the perpetrator gave rise to an overwhelming circumstantial case, bolstering his voluntary confession. (In fact, given subsequent evidence, it is clear that Mr. Deskovic had been able to glean such details from his dealings with police and his involvement in the investigation over a period of many weeks.) The prosecutor also made spurious arguments to the jury about why the DNA testing of the semen, which had been deposited in the victim’s vaginal cavity by the rapist, and which conclusively excluded Mr. Deskovic as the perpetrator, was not exculpatory. It can only be guessed at why the Appellate Division decision denying relief did not even mention the DNA evidence that excluded Mr. Deskovic. The Appellate Division wrote:

On the afternoon of November 15, 1989, the defendant struck the victim over the head with a blunt object, and dragged her into a wooded area, where he beat, raped and strangled her.

....

[There was no] indication in the record that the defendant’s extensive statements on January 25, 1990, . . . were precipitated by a coercive environment or police misconduct “that could induce a false confession” . . .

....

. . . There was overwhelming evidence of the defendant’s guilt in the form of the defendant’s own multiple inculpatory statements, as corroborated by such physical evidence as the victim’s autopsy findings . . .

*People v. Deskovic*, 607 N.Y.S.2d 957, 957 (2d Dep’t 1994) (citations omitted). For many years thereafter, the Westchester County District Attorney, Jeanine Pirro, refused to run the DNA profile from the semen sample through state and federal DNA databases to try to identify the true perpetrator. Later, a new district attorney, Janet DiFiore, agreed to do so, resulting in a cold hit on an incarcerated murderer, who later pled guilty to the Correa rape-murder. On November 2, 2006, the prosecutor moved for dismissal of the indictment on the grounds that Mr. Deskovic was actually innocent, having served seventeen years for a rape-murder he did not commit. *SNYDER ET AL.*, *supra*, at 31.

60. *SNYDER ET AL.*, *supra* note 59, at 19.

61. Mr. Deskovic’s case is hardly unique. Professor Garrett reports that in thirty-eight of the forty DNA exonerations involving confessions (or otherwise apparently incriminating admissions) then in his dataset, the innocent suspect was alleged to have provided to police details of the crime that only the perpetrator could have known. See Brandon L. Garrett, *The Substance of False Confessions*, 62 *STAN. L. REV.* 1051, 1068 (2010). See also the discussion of the McSherry case, *infra* note 62.



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hearings) in the defense lawyer's "discovering" before trial that the young victim whom McSherry was accused of abducting and molesting had accurately described the inside of his apartment to police.<sup>62</sup> Powerful evidence against McSherry, you might say, given the fact that the victim and McSherry were otherwise unknown to each other. But, in fact, it became clear after McSherry was exonerated much later with DNA evidence that the little girl must have in fact somehow been informed by police of the appearance of the inside of McSherry's apartment.

### V. NEUTRAL INVESTIGATION AND JUDICIAL SUPERVISION

Examples abound in which terrible mistakes like these could have been avoided through the use of more careful investigatory procedures.<sup>63</sup> But investigatory procedures driven by tunnel vision are the natural and inevitable result of a partisan investigatory

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62. In McSherry's case, a six-year-old girl was abducted from a playground in Long Beach, California in March 1988 by a man who took her in a car to a building (which she may have initially described as a "brown house") with a bedroom where he raped her. He released her and she went home and reported the assault to her parents and the police. The police put together photo arrays using photos of convicted sex offenders who lived in the area, of whom Leonard McSherry was one. The child allegedly chose McSherry's photo, although he did not conform to her previous descriptions. The police then showed the victim photos of cars and she reportedly identified McSherry's father's yellow Mazda station wagon as the vehicle she rode in, even though the victim, her little brother, and a neighbor had all previously described a green vehicle (a "strange green car"; a "green pickup"). After McSherry was arrested at his grandparents' home, the victim was shown a photo of McSherry's grandparents' house and she allegedly identified it and provided a detailed description of the interior, including the content of pictures on the wall, the color of sheets and blankets on the bed, and so on. This identification and these descriptions did not conform to the victim's earlier descriptions of the house to which the perpetrator had taken her (a brown house with stairs, a bedroom with a television and without pictures on the walls). See *McSherry v. City of Long Beach*, 423 F.3d 1015, 1017–19 (9th Cir. 2005). For many years, before, during, and after trial, throughout appellate and post-conviction proceedings, the prosecution continued to allege that the victim had provided these detailed descriptions of the inside of McSherry's house, not as the result of any information given to her by the police, but rather from her own independent memories of events. This was based on the case detective's statements to the prosecutor and the detective's trial testimony, which created a very powerful but false circumstantial case against McSherry. This is most strikingly at play in *People v. McSherry*, 14 Cal. Rptr. 2d 630 (Cal. Ct. App. 1992), *depublished by People v. McSherry*, No. S030923, 1993 Cal. LEXIS 1539 (Cal. Mar. 18, 1993), which affirmed the trial court's denial of a motion for a new trial, based on Dr. Edward Blake's 1992 test of the DNA evidence and his conclusion that McSherry was definitely excluded as a perpetrator. In its discussion of the case, the appellate court characterized the evidence against McSherry as "overwhelming," and cited the prosecutor's argument that "the only way that girl could have given that description of that house prior to the search warrant was because she in fact had been in there." *Id.* at 1167, 1169, 1173. In December 2001, a cold hit in the DNA database resulted in the identification of the true perpetrator, George Valdespino, who was serving a life sentence in California state prison and who admitted in a taped confession that in 1988 he had kidnapped a girl in the Long Beach area in a green Ford Ranchero and taken her to a motel room to molest her. McSherry was released, having served nearly fourteen years of his forty-eight-year sentence. *McSherry*, 423 F.3d at 1018. In a deposition in McSherry's civil case, the victim testified that, contrary to the detective's trial testimony, she had not provided the detailed descriptions of the place to which the perpetrator had taken her. *Id.* The facts alleged by police in the McSherry case were oddly similar to those in *Bridges v. State*, 19 N.W.2d 529 (Wis. 1945).

63. As Professor Gross has said:

We often talk of a miscarriage of justice as an error at trial, but that's a mistake. The error occurs much earlier, in the investigation of the crime, when the police identify the

process.<sup>64</sup> Partisanship in investigation and adjudication can give rise to gross inaccuracy, which is necessarily disastrous for the innocent. What is needed are means of neutralizing the perspective of criminal investigation, from the first point of contact with a crime to the time when a charging decision is made and a charge is lodged, either by complaint or indictment. We see two main components to this necessary neutralization: better training of investigatory personnel and judicial oversight of the investigatory process from the point of first contact to the charging decision.

As to better training, every sworn officer of every jurisdiction should be trained in the dangers of “tunnel vision”—that is, developing and becoming committed to a single hypothesis of guilt that renders it difficult to properly process information counter to that hypothesis, as revealed by both the psychological and criminological literature and practical experience.<sup>65</sup> In addition, every member of a detective force should be trained in the necessity to conduct a “two-sided” investigation<sup>66</sup> that always investigates vigorously both the hypothesis of guilt and the hypothesis of innocence, perhaps aided structurally by “devil’s advocate” case reviews. This emphasis on disconfirmation as a primary tool of inquiry has been a part of the standard methodology of science since the time of Sir Francis Bacon.<sup>67</sup> This should be accompanied by an emphasis on the duty of law enforcement to exonerate the innocent as well as the duty to convict the guilty.<sup>68</sup>

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wrong person as the criminal. If they gather enough evidence against this innocent suspect, the error will ripen into a criminal charge.

Samuel R. Gross, *The Risks of Death: Why Erroneous Convictions Are Common in Capital Cases*, 44 BUFF. L. REV. 469, 475–76 (1996).

64. See Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 292–93.

65. *Id.* at 292.

66. We originally were inclined to call this a “two-tailed” investigation, but this did not quite map on to the use of that term in statistics. Based on the ancient joke about clients not liking a “two-handed” lawyer—one that says “on the one hand, on the other hand”—we considered “two-handed” investigation (because if the client is justice, a two-handed investigator is exactly what is needed), and that was the term we used in our original draft. However, on reflection, “two-handed” seemed to be too close to “two-fisted” for comfort. We have therefore settled on “two-sided” as capturing the best image of the intended meaning.

67. See D. Michael Risinger, Michael J. Saks, William C. Thompson, & Robert Rosenthal, *The Daubert/Kumho Implications of Observer Effects in Forensic Science: Hidden Problems of Expectation and Suggestion*, 90 CALIF. L. REV. 1, 6–7 (2002).

68. This has recently been established as an ethical obligation for prosecutors by the American Bar Association. ABA Standard 1.2 for prosecutors, as of 2008, now reads:

- (a) An individual prosecutor is not an independent agent but is a member of an independent institution the primary duty of which is to seek justice.
- (b) The prosecutor’s client is the public, not particular government agencies or victims.
- (c) The purposes of a criminal investigation are to:
  - (i) develop sufficient factual information to enable the prosecutor to make a fair and objective determination of whether and what charges should be brought and to guard against prosecution of the innocent, and

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New and better training in “two-sided” investigative techniques can help, but reforming general police culture is neither easy nor quick. If it is ever to be effective, different organizational arrangements emphasizing neutral judicial oversight must be incorporated into practice, at least from the first point in the process where a decision is made to conduct an investigation aimed at discovering and bringing to justice the perpetrator of a serious crime already committed. To that end, we recommend that detective divisions of current police forces (and any forensic science laboratories or personnel) be separated into an independent agency, overseen by judicial officers trained in “two-sided” investigative techniques. Normal patrol functions and undercover investigative functions aimed at the prevention and discovery of crime (rather than at the investigation of specific crimes already known to have been committed) can for the sake of efficiency remain in the current structure.<sup>69</sup>

This newly neutralized judicial structure of criminal investigation would lay the foundation for yet another reform: the diminished involvement of the traditional prosecutor in criminal investigations before the charging decision, and before the involvement of defense counsel. Although we are to a certain degree adversary skeptics who believe that partisan excesses on both sides are the enemies of accuracy and justice, we also believe that there are epistemic benefits to properly structured adversariness, and that these benefits cannot be obtained in a system where one partisan advocate (the prosecutor) has effective control over the entire process in secret until the most important part of evidence development is over. In our suggested structure, the judicial officer trained in neutral investigative techniques, and socialized in a responsibility to the truth independent of a partisan function, would make the

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(ii) develop legally admissible evidence sufficient to obtain and sustain a conviction of those who are guilty and warrant prosecution.

(d) The prosecutor should:

(i) ensure that criminal investigations are not based upon premature beliefs or conclusions as to guilt or innocence but are guided by the facts . . . .

STANDARDS ON PROSECUTORIAL INVESTIGATIONS 1.2 (2008), *available at* [http://www.americanbar.org/publications/criminal\\_justice\\_section\\_archive/crimjust\\_standards\\_pinvestigate.html#1.2](http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pinvestigate.html#1.2).

69. Nothing in these reforms will solve the serious “plea to time served” problem that results in the conviction of the innocent for misdemeanors and low-grade felonies in many urban environments. But the suggested arrangement insures that, in regard to serious crime, the investigators and those to whom they are immediately responsible be at least formally committed by role and training to neutral investigation, and it separates the undercover operations that develop information concerning the existence of crime (and which virtually by necessity gives rise to the most extreme partisanship in those involved in such operations) from the investigation of perpetration in ordinary crime cases. We must admit that proper control of undercover operations is a knotty and organizationally difficult problem, but for a variety of reasons we consider it to be beyond the scope of this article. However, we are convinced that, far from fostering the kind of neutral attitude that is necessary for reliable, normal criminal investigation, involvement in undercover investigations as a simultaneous aspect of one’s duties fosters exactly the opposite mindset. Whatever is done organizationally with the necessary “secret police” functions of criminal investigation (and we do not quarrel with their necessity), we believe that they should be kept carefully separate from ordinary detective functions, even going so far as to suggest that they should perhaps be viewed as separate career tracks.

charging decision, after having overseen the investigation up to that point.<sup>70</sup> At that point the entire results of investigation, including the investigatory personnel (detectives, forensic scientists, forensic pathologists, etc.), would become available to both the prosecution and defense for consultation, and for the potential conduct of follow-up investigation or testing suggested to the magistrate by either the prosecutor or the defense attorney. Prosecutors should prosecute. Defenders should defend. Investigations should be as neutral as possible, and specialized judges, the descendants of common law justices of the peace and coroners, should oversee them to that end.<sup>71</sup>

## VI. ELECTIVE FACTUAL INNOCENCE PROCEDURES

Our proposal differs from many others who have called for judicial control of the investigatory stage, in that it terminates exclusive judicial control at the charging stage. At that point the primary control over information gathering and structuring returns to the adversaries, with the judge remaining in the background and serving only to oversee any new investigation requested by the parties, and the required exchanges of information prior to trial which would of course be a feature of the new structure. The breadth of those interchanges, and the structure of the trial itself, would be controlled by an election of the defendant, to be made within a reasonable time after the charges being lodged and the defendant being arraigned on those charges.<sup>72</sup> At that time, the defendant would have the opportunity to elect between two tracks, which would determine both the structure of further pretrial proceedings and the rules by which the trial itself would be conducted. These two tracks might be referred to as the factual innocence track and the traditional track (which would be the default track in the event of a failure to make an actual election).

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70. This transfer of the case to a full adversarial procedure once the preconditions of a robust and balanced adversarial procedure are in place differentiates our proposal from any proposal that attempts simply to transplant the Continental investigating magistrate into American criminal procedure.

71. Here we must register both our agreements and disagreements with aspects of the positions taken in Tim Bakken, *Truth and Innocence Procedures to Free Innocent Persons: Beyond the Adversarial System*, 41 U. MICH. J.L. REFORM 547 (2008). Leaving individual details aside, Professor Bakken's suggested approach to innocence procedures has, as we see it, two main drawbacks: first, that such procedures are triggered much too late in the process of investigation (that is, after the charging decision), and, second, that they are administered by a prosecutor in the first instance. We hope we have shown that the protection of the innocent requires changes to current practices at the point of the first contact of the case with the criminal justice system, from the beginning of the investigation forward. We also think it much more desirable for the newly neutralized investigation procedures to be under the direction and control of a judicial officer instead of a prosecutor or a person responsible to the prosecutor. However, we are mindful of the resistance on budgetary grounds that the creation of a new, large cadre of such specially trained judges would encounter, and we believe that a second best solution, one that might be more easily put into practice, would be for prosecutors (in jurisdictions where they have such authority) to create neutralized investigation units to take control of and direct investigations in major crimes along the substantive lines we have proposed. For a similar suggestion that "screening committees" be lodged in prosecutors' offices to review charging decisions, see Daniel S. Medwed, *Emotionally Charged: The Prosecutorial Charging Decision and the Innocence Revolution*, 31 CARDOZO L. REV. 2187 (2010).

72. Obviously, defendants who are charged but not yet apprehended are in no position to make elections. In such cases, the judge would retain control over the case until apprehension and arraignment.

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The traditional track would continue to operate from the point at which the adversaries receive the case from the investigating judge, much the same way in which things operate today, as far as the obligations of adversaries to each other are concerned, with only such exceptions as are outlined below. The “factual innocence” track would require the defendant to make a limited waiver of the privilege against self-incrimination, in that the defendant would commit himself to testify at trial, and also make himself available for a formal pretrial deposition in front of, and to be conducted primarily by, the judge. In return, the defendant would be able to depose witnesses against him, would receive complete discovery, including any grand jury testimony that might have been given, and would be tried under a special rule that, among other things, would severely restrict the ways in which emotional issues are brought into the trial, including what one of us has previously referred to as “heartstrings and gore” evidence.<sup>73</sup> The point of such a trial would be to try the one or two issues identified by the defendant as the binary issues of fact upon which his factual guilt or innocence turns. The election would therefore operate as an admission that the state of mind of the perpetrator was such as to qualify for conviction under the top count of the indictment.<sup>74</sup>

Adoption of this structure would accomplish the goals of “discovery reform,” in that both sides would have full access to the main body of information developed up to the charging decision, to the court for aid in supplementary investigation, and to depositions should the defendant elect the “factual innocence” track. It would also, by eliminating the prosecution’s virtual monopoly on investigation, foster a true adversary system in which the adversaries concentrate on their epistemically valuable functions of marshalling, explaining, and testing the implications of the facts, and not on producing, massaging, and malleating the facts. It would not, however, solve all the systemic problems relating to the protection of the factually innocent. Whether administered by the police, the prosecutor, or a neutral judge, the investigatory system has certain problematic areas that present special dangers to the innocent, and that therefore present special challenges for proper handling in ways that will protect the innocent, while at the same time generating reliable information that will convict the guilty. The three main problem areas are interrogation and confession, eyewitness identification, and witness malleation and intimidation.

## VII. INTERROGATIONS AND CONFESSIONS

It is now customary, both in police parlance and in the literature, to distinguish between witness “interviews” and the interrogation of suspects.<sup>75</sup> And by suspects we mean people who are being approached by the questioner as perpetrator candidates, whether they are styled “suspects,” “targets,” or “people of interest.” Even in a judge-administered system, it would be unwise to eliminate all interrogation of suspects, or

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73. D. Michael Risinger, *John Henry Wigmore, Johnny Lynn Old Chief, and “Legitimate Moral Force”—Keeping the Courtroom Safe for Heartstrings and Gore*, 49 HASTINGS L.J. 403 (1998).

74. See Risinger, *supra* note 3, at 1311–13.

75. See RICHARD A. LEO, *POLICE INTERROGATION AND AMERICAN JUSTICE* 22 (2008).

to move to a system of interrogation that was so public and formalized that it would reliably yield no confessions or incriminatory statements from guilty suspects.<sup>76</sup> It is here that we will probably part company with a large percentage of the criminal defense community. We understand, and to a certain extent are sympathetic with, the logic of their position: that the privilege against self-incrimination should mean that only those who are spontaneously moved to confess for their own reasons of conscience should have any of their own statements to officials used against them; that it is a fiction to think that most people who now fail to invoke the privilege, and who confess or make otherwise damaging statements under interrogation, have in any meaningful sense made a knowing waiver; and that therefore most confessions currently used should be viewed as having been obtained in violation of the privilege. The near-fictional nature of waiver law is indeed troubling. On the other hand, we are also sympathetic with the people who say that the privilege, in its core justifiable content, is only directed at the “third degree,” or at extreme psychological abuse, and that as long as interrogators avoid these things, interrogation should be an available technique unless the target firmly refuses, even in the face of the blandishments that usually result in undertaking to cooperate. These two positions cannot be reconciled, but the life of the law is sometimes neither logic nor experience, but a muddled amalgam attempting to find a middle ground between two inconstant logics. Perhaps we, like the law, find ourselves in that position. One approach to attempting to find a path through the brambles is to be careful to separate dignitary from epistemic arguments, and to carefully examine the limits of each.

Even if torture yielded highly reliable information, we would oppose it. It violates the dignitary rights of the tortured and the torturer and corrodes the society that tolerates it no matter what the claimed consequentialist justifications. The line between torture and interrogation techniques that are not so painful, physically or psychologically, that they can be justified on consequential grounds is notoriously difficult to draw, as recent history has shown.<sup>77</sup>

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76. Since the nineteenth century there have been calls for returning the examination of suspects to the supervision of a magistrate. See Yale Kamisar, *Kauper's "Judicial Examination of the Accused" Forty Years Later—Some Comments on a Remarkable Article*, 73 MICH. L. REV. 15, 15 n.3 (1974) (reviewing proposals starting in 1883). The most elaborately crafted and justified was that set out in Kauper, *supra* note 36, followed up on in WALTER SCHAEFER, *THE SUSPECT AND SOCIETY* (1967) and Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671 (1968). For an analysis of Kauper's proposal, see Kamisar, *supra*, at 16–25. Such proposals have been floated more recently, most notably perhaps by Akhil Amar and Renée Lettow without much practical effect. See Amar & Lettow, *supra* note 5, at 898–901. Our proposal differs from all of these in that the magistrate would determine whether there was in fact probable cause for an interrogation and set limits on it in terms of time and techniques to be employed (perhaps revisiting these conditions as the interrogation unfolded), but would not administer the *Miranda* warnings nor conduct or be present for the actual interrogation, leaving the conduct of the interrogation to trained interrogators within the detective force. We hope that this conservatism might actually stimulate those not immediately inclined to substantial alterations in current arrangements to actually consider supporting an arrangement such as the one we propose.

77. A Westlaw search reveals more than 350 articles with the word “torture” in the title published in the last nine years, most of them dealing with torture and U.S. policy and behavior in the aftermath of 9/11. Typical titles include: Jonathan Hafetz, *Torture, Judicial Review, and the Regulation of Custodial Interrogations*, 62 N.Y.U. ANN. SURVEY AM. L. 433 (2007); Mary-Hunter Morris McDonnell, Loran F.



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Since the demise of the routine use of the third degree, and the professionalization of interrogation and police practices generally that has occurred since the 1930s, techniques properly classified as torture have disappeared in ordinary criminal interrogations except in anomalous instances,<sup>78</sup> and that is all to the good. Some of the techniques that have replaced them, however, including many of the techniques in the standard Reid/Inbau method of interrogation,<sup>79</sup> are epistemically dangerous, either in all contexts or in regard to certain definable classes of witnesses. This is not the place to catalogue every danger, but these problematic techniques include, perhaps most notoriously, engaging in lengthy, hostile interrogation by multiple interrogators; cutting off all denials and creating a belief in the suspect that there is no hope; and using one interrogator to apparently befriend the suspect (provide emotional support, offer “minimization” scenarios for the suspect to adopt, telling the target that it would be understandable if they had blacked out and actually committed the crime even if they did not clearly remember doing so), and so on.<sup>80</sup> Such techniques can be dangerous with almost any witness, but are especially so with those of low intelligence, low sophistication, young age, and little experience with the justice system.<sup>81</sup> Some

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Nordgren & George Loewenstein, *Torture in the Eyes of the Beholder: The Psychological Difficulty of Defining Torture in Law and Policy*, 44 VAND. J. TRANSNAT'L L. 87 (2011); and John T. Parry, *What Is Torture, Are We Doing It, and What If We Are?*, 64 U. PITT. L. REV. 237 (2003). There are, of course, books too. See, e.g., MICHAEL L. GROSS, *MORAL DILEMMAS OF MODERN WAR: TORTURE, ASSASSINATION, AND BLACKMAIL IN AN AGE OF ASYMMETRIC CONFLICT* (2010); GAIL H. MILLER, *DEFINING TORTURE* (2006).

78. See LEO, *supra* note 75, at 78–81.

79. The dominant method of interrogation in the United States, called the “Reid/Inbau Method,” was developed decades ago by Fred Inbau and John E. Reid, based on their views and perceptions of how people behave when they are innocent and telling the truth, as opposed to how people behave when they are guilty and lying. See FRED E. INBAU, JOHN E. REID, JOSEPH P. BUCKLEY & BRIAN C. JAYNE, *CRIMINAL INTERROGATION AND CONFESSIONS* 121–53, 173–206 (4th ed. 2004) (originally published in 2001). Based on personal observations and anecdotes, the authors prescribe the “Behavioral Analysis Interview” for investigators to catch the numerous signs and signals of deception, on the basis of which a detective can decide to move from the non-accusatory interview to the confrontational interrogation. To take two of many examples, according to Inbau and Reid, a truthful suspect is properly condemnatory of the perpetrator’s actions, while a guilty person will offer reasons or excuses for the perpetrator; a lying suspect’s eyes are “evasive or shifty,” while a truthful person’s eyes are “warm” and “direct.” See *id.* at 173–91. Most of the folksy premises underlying the Reid/Inbau Method of lie detection have not been borne out by responsible research. See, e.g., ALDERT VRIJ, *DETECTING LIES AND DECEIT: PITFALLS AND OPPORTUNITIES* 189–200 (2d ed. 2008).

80. Some of these techniques are easily recognized as parts of the “Reid Nine Steps of Interrogation.” See INBAU ET AL., *supra* note 79, at 209–398. Other techniques are apparently offshoots engaged in by individual interrogators. Reid & Associates experts sometimes testify on behalf of defendants about the dangers of improper police interrogation techniques (such as excessively long and hostile interrogations). See *Civil Liabilities Associated With False Confessions*, JOHN E. REID & ASSOCIATES, INC. (Nov.–Dec. 2009), [http://www.reid.com/educational\\_info/r\\_tips.html?serial=12572763383929185](http://www.reid.com/educational_info/r_tips.html?serial=12572763383929185), for the Reid & Associates discussion of dangerous interrogation techniques and the possible civil liability incurred for using them.

81. The special dangers to the mentally impaired, for example, have been well documented. See, e.g., GISLI H. GUDJONSSON, *THE PSYCHOLOGY OF INTERROGATION AND CONFESSIONS: A HANDBOOK* 308–31 (2003). Information about false confessions and their causes is not found in INBAU ET AL., *supra* note 79, but Reid & Associates has been attempting to take a responsible part in the dialogue over false confessions, for example, by posting information about false confessions and criticisms of the Reid/



such techniques should be outlawed, period, because of their obvious epistemic dangers. Others are perhaps justified in certain circumstances with certain witnesses.<sup>82</sup> However, all interrogations (as opposed to interviews) are to some extent dangerous. Accordingly we believe that one advantage of judicial supervision of pre-charge investigation is that it would easily allow the incorporation of a probable cause requirement before any move from interview to interrogation is made. This would require an order of the supervising judge, based on the reasons given to the judge by police to justify interrogation, and with potential restrictions on available techniques being made by the judge in light of the facts known about the target's age, intelligence, and sophistication and experience with the legal process.

In addition to a probable cause requirement for interrogation, there should be a complete video recording of every minute of every contact with suspects, including arrestees.<sup>83</sup> This can easily be accomplished technologically today. "Trooper cams" and public video surveillance cameras have shown the way. Besides cameras in all police vehicles that are automatically activated whenever the flashers are turned on, there should be similar interior cameras that are activated whenever there is a back seat passenger (which would cover the transport of all suspects and witnesses), and also surveillance cameras covering all public and interrogation spaces and connecting hallways. This would provide a truly full record of the handling and interrogation of suspects, and would eliminate the suspicion that things were done before the "official" version of a video confession was generated. We suspect that this would be opposed until it was adopted, but then, like trooper cams themselves, become generally popular with law enforcement because it would eliminate lies by defendants about what happened in custody.<sup>84</sup> Previous logistical objections to the general adoption of such systems have now been made obsolete by the cheapness of both cameras and digital storage capacity. The only remaining logistical problem would be the design

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Inbau Method on its website. Reid & Associates officially takes the position that false confessions are rare and only occur in cases of juveniles, mental impairment, illegal police practices, and excessively long interrogations. *False and Coerced Confessions: Distinguishing Between True and False Confessions*, JOHN E. REID & ASSOCIATES, INC., [http://www.reid.com/educational\\_info/criticalseconf.html](http://www.reid.com/educational_info/criticalseconf.html) (last visited Oct. 17, 2011). The questions of how to characterize the factors involved in confessions that have been proven to be false (through DNA exoneration), and whether or not to take into account false confessions by persons who were never actually convicted, give rise to disagreements about the dangers of the Reid/Inbau Method. But progress is being made.

82. Professor Findley recently provided a detailed update on new techniques and international perspectives regarding interviewing and interrogation techniques. See Findley, *supra* note 19, at 164–65.
83. Calls for audio and even video (film) recording of interrogations go back almost a half century. See the discussion (from 1975) in Kamisar, *supra* note 76, at 24 n.27, 27–28.
84. See, e.g., Rachael Conway, *Caught on Camera: Suburban Police Departments Realize Benefits of "Cruiser Cams"*, PITT. POST-GAZETTE, Apr. 15, 2010, at EZ-1, available at <http://www.post-gazette.com/pg/10105/1050302-55.stm>. Similar responses have been seen in the video recording of interrogations, at least in the limited context in which that has been required. See JOHN PETRO, DRUM MAJOR INST. FOR PUB. POL'Y, NO MORE DELAY: PROVEN POLICY SOLUTIONS FOR NEW YORK CITY 10–13, [http://www.drummajorinstitute.org/pdfs/DMI\\_proven\\_policy\\_report\\_final.pdf](http://www.drummajorinstitute.org/pdfs/DMI_proven_policy_report_final.pdf). For an overview of law enforcement views of the pros and cons of electronic recording of interrogations, see DAVID M. BUCKLEY & BRIAN C. JAYNE, ELECTRONIC RECORDING OF INTERROGATIONS 1–16 (2005).

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of a central digital indexing system that would make the retrieval of individual case recordings efficient. This is a programming challenge that would be quickly met in any for-profit setting where it would provide a value-enhancing solution. The law has been much too slow to adopt, and then mandate, technological solutions to epistemic problems, but there is no time like the present to begin.

### VIII. EYEWITNESS IDENTIFICATION

The problems of eyewitness identification are perhaps harder to address, being to a great degree inherent in the phenomenon. It has long been recognized that eyewitness identifications, especially stranger-on-stranger eyewitness identifications, are a problematical tool in the quest to convict the guilty, and a source of error of uncomfortably large dimensions in the wrongful conviction of the innocent. As Justice Brennan said in *United States v. Wade*:

The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification. Mr. Justice Frankfurter once said: "What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials."<sup>85</sup>

And as a New York appellate court has said: "[e]fforts to control or, at least, to somehow reduce the built-in potential for error in eyewitness cases have long been the concern of the best minds of both Bench and Bar."<sup>86</sup>

Unfortunately, it is clear that the best minds of the Bench and Bar have yet to arrive at a satisfactory solution.

What makes this clear is the stark view through the window opened on the world of wrongful conviction of the factually innocent by the DNA exonerations. Of the first 250 DNA exonerations, more than three-quarters involved inaccurate eyewitness identifications.<sup>87</sup> Perhaps, given the nature of the sexual assaults that dominate this set of cases, it is inevitable that a high percentage of such cases found to be in error through the *deus ex machina* of DNA would involve a mistaken eyewitness identification. However, what is really more dramatic, and not so inevitably entailed, is the number of cases that have involved *multiple* erroneous identifications. In more than thirty-six percent of those cases involving eyewitness identification, there were multiple erroneous eyewitness identifications,<sup>88</sup> and most of those multiple eyewitness cases were cases where eyewitness identifications were

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85. 388 U.S. 218, 228 (1967) (footnote omitted) (quoting Felix Frankfurter, *The Case of Sacco and Vanzetti*, ATL. MONTHLY, Mar. 1927).

86. *People v. Daniels*, 453 N.Y.S.2d 699, 704 (2d Dep't 1982).

87. 190 of 250 cases, or 76%. BRANDON L. GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* 48 (2011).

88. *Id.* at 50. As Professor Garrett there says, "[w]ho were the eyewitnesses who misidentified innocent people? I was surprised to discover that 36% (68 of 190 exonerees) were identified by multiple eyewitnesses, some by as many as three or four or five." *Id.*

the dominant evidence that the defendant was the perpetrator. In addition, in forty-six cases witnesses had participated in generating a sketch of the perpetrator,<sup>89</sup> and in most of those cases initial suspicion fell on the convicted innocent because of a supposed resemblance to a police sketch.

Clearly, multiple identifying witnesses are no good guarantee of accuracy, so counting multiple identifications as mutually corroborating in any strong sense is a tragically flawed perception. Yet that perception continues to drive certain proof doctrines in many jurisdictions. For instance, in New York there is a jury instruction for single eyewitness identification cases, but no similar instruction for cases involving two or more eyewitness identifications.<sup>90</sup> It may be, however, that it is certain identifiable *types* of multiple eyewitness cases where enhanced caution is most required.<sup>91</sup> The law may occasionally recognize the dangers of multiple identifications in some circumstances, but it does remarkably little about it in actual practice.

89. *Id.* at 52.

90. See N.Y. C.J.I. *Identification—One Witness* (2d ed. 2001), available at [http://nycourts.gov/cji/1-General/CJI2d.Identification-One\\_Witness.pdf](http://nycourts.gov/cji/1-General/CJI2d.Identification-One_Witness.pdf).

91. Perhaps some examples would show how far the problem can extend. The most famous miscarriage of justice of the modern era in England was the case of Adolph Beck, who spent many years in prison after having been misidentified in two separate trials (1896 and again in 1904) by sixteen separate witnesses as the man who defrauded each one using a particular distinctive story. Even though each of the witnesses spent a significant amount of time with the perpetrator (an hour or two), all were finally shown to have been mistaken after the apprehension of the actual perpetrator. This case is the main case that led to the creation of the British Court of Criminal Appeals and laid the foundation for the British “unsafe verdict” standard of review, to which we will return. See generally RICHARD NOBLES & DAVID SCHIFF, *UNDERSTANDING MISCARRIAGES OF JUSTICE: LAW, THE MEDIA, AND THE INEVITABILITY OF CRISIS* 48–55 (2000); ERIC R. WATSON, *ADOLPH BECK (1877-1904) (1924)*.

Or consider the case of the Reverend Bernard Pagano, a priest identified by multiple witnesses in Delaware in 1979 as the “Gentleman Bandit,” the perpetrator of a series of holdups. The actual perpetrator turned out to be a look-alike named Ronald W. Clouser. Pagano was originally made a suspect because the police were told that he resembled a composite sketch of the “Gentleman Bandit.” *Rev. Bernard T. Pagano Dies at 81; Priest Mistaken for ‘Bandit,’* N.Y. TIMES, Aug. 13, 2006, at 30, available at <http://query.nytimes.com/gst/fullpage.html?res=9502EFD7163EF930A2575BC0A9609C8B63>. We will examine this “investigative method” below also.

And consider the case of Kirk Bloodsworth, who in 1984 became a suspect in the brutal rape-murder of nine-year-old Dawn Hamilton solely on the basis of an anonymous phone call reporting his resemblance to a composite sketch done by various witnesses to the events leading up to the murder. He was then identified through line-ups by five people and spent years on death row. He was finally exonerated by DNA testing on semen recovered from the murder scene. The same DNA identified the real murderer, Kimberley Shay Ruffner, who pled guilty to the murder in 2004. See TIM JUNKIN, *BLOODSWORTH: THE TRUE STORY OF THE FIRST DEATH ROW INMATE EXONERATED BY DNA* 75–77, 98–101, 275–82 (2004).

Finally, consider, merely as examples among others, two modern New York exonerations with which the authors are intimately familiar: those of Kevin Luis Rojas and Fernando Bermudez. Rojas was identified (wrongly) by seven witnesses after he was “perp walked” in front of them, having been arrested on a PATH train some blocks from the scene of a shooting because of the color of his jacket. Discovery of a PATH police sergeant who could establish Rojas’s presence on the PATH platform at the time of the shooting finally led to his exoneration, after four and a half years in prison, reversal, acquittal after retrial, and, finally, a finding of actual innocence and grant of compensation by the New York Court of Claims. See *Rojas v. Iannatto*, No. 01 Civ. 9131 (NRB), 2003 U.S. Dist. LEXIS 938 (S.D.N.Y.

## IX. MUGSHOT TRAWL SEARCHES

In this article we will identify a category of eyewitness identifications that are extremely weak because of the common practices that have been used to obtain them, and whose weakness infects all the identification evidence so derived, whether the result is an identification by a single witness or by multiple witnesses. The truly insidious nature of these practices lies in the fact that they are undertaken routinely and honestly by well-intentioned law enforcement officers because, on a common-sense level, these practices seem to be exactly the right way to proceed. We are referring to identifications obtained as the result of the examination by witnesses of mugshot collections, or, less commonly, identifications that result from the creation of sketches of the perpetrator by witnesses working with police sketch artists. Both of these techniques share a common and potentially fatal flaw: both are techniques that select the identified person from a large candidate set of persons based exclusively on the persons resemblance to the perpetrator. They are thus forms of “trawl search.”<sup>92</sup>

Even though under some circumstances you might mistake a person seen fleetingly for your sister, as we have already said, there seems to be little doubt that stranger identifications carry with them a greater risk of inaccuracy than do acquaintance identifications in most circumstances. Humans seem pretty good (though not necessarily perfect) at internalizing the particularizing aspects of appearance for their acquaintances, especially their intimate acquaintances. They seem less good at doing so for persons seen in short encounters.<sup>93</sup> Another way of saying this is that few people will count as confusably similar when we deal with our friends and relations, somewhat more will count as confusably similar when we deal with casual acquaintances, and more still when we deal with strangers encountered once for a short period. In addition, in the former case of friends and relations, the reliable diagnosticity of our memories is likely to be more stable over time than will be the case with strangers encountered once.

Nothing that we have just said is particularly counterintuitive or controversial. However, it has significant implications for how the law should treat claimed exercises

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Jan. 24, 2003). Bermudez was finally exonerated in 2009 after serving eighteen years in prison for a murder he did not commit. He was convicted on the mistaken testimony of four stranger eyewitnesses after a trawl search through mugshots and on the perjured testimony of a co-participant in the crime. *People v. Bermudez*, 906 N.Y.S.2d 774 (Sup. Ct. N.Y. County 2009). The full record of each of these cases is on file with the authors.

92. A “trawl search” (sometimes called a “specification search”) occurs anytime a search is performed by individually examining large numbers of members of a predefined universe of items to determine which ones fit a predetermined “match” criterion. *See infra* notes 96–98 and accompanying text.

93. Decreasing accuracy as a function of time of exposure is hardly counterintuitive, and it was one of the first effects documented by formal experimentation. *See, e.g.*, Kenneth R. Laughery, Judith F. Alexander, & Alan B. Lane, *Recognition of Human Faces: Effects of Target Exposure Time, Target Position, Pose Position, and Type of Photograph*, 55 J. APPLIED PSYCH. 477 (1971); *see also* ELIZABETH F. LOFTUS, JAMES E. DOYLE & JENNIFER E. DYSART, *EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL* (4th ed. 2007). Exposure time is of course only one of many “event” and “post event” factors that influence encoding and recall of identification details. *See id.* at 22.

in eyewitness identification, implications that have up to now been generally overlooked. Interestingly, one of the few who have not overlooked those implications is the generally pro-prosecution eyewitness researcher, Dr. Ebbe Ebbesen.

In November of 2000 Dr. Ebbesen wrote as follows:

*Lineup diagnosticity* is one measure that some (e.g., Wells & Lindsay, 1980) have suggested should be used to assess the ability of witnesses to indicate accurately who the culprit is when shown a lineup. This measure compares the rate at which subjects falsely identify “innocent” suspects in target absent lineups to the rate of correct choices of the “guilty” target in target present lineups. The higher this ratio, the more diagnostic the lineup is thought to be. Of course, this measure can only be computed in experimental studies (with a known culprit) that use single-event/culprit, multiple witness paradigms in which different subjects are shown the same target present or target absent lineup. This is because lineup diagnosticity would be expected to be different for different culprits, foils and suspects.

As Navon (1990) correctly noted, given the decision problem facing police, prosecutors, and jurors, lineup diagnosticity is not the measure of diagnosticity on which the real world should focus its attention. This is because lineup diagnosticity depends so much on how the experimenter selects the innocent suspect for the target absent lineup as well as the match between what the target looked like during the event and what he or she looked like in the lineup (photo). *It seems obvious that the more the innocent suspect looks like the culprit, the higher the false alarm rate will be (assuming that the witnesses remember something about the culprit’s looks).*<sup>94</sup>

Dr. Ebbesen made these observations as part of an evaluation of the weaknesses of some current views concerning the low diagnosticity of a witness’s confidence in an identification. A little later he summarizes his position thus:

*The problem for the real world decision-maker is estimating the number of people who match the evidence (e.g. suspect seen driving a similar car, gun found in suspect’s home, etc.) and who look enough like the culprit that a witness would be willing to say “that’s him.”*<sup>95</sup>

Here, Dr. Ebbesen has assumed that the suspect who will be put in a line-up or photo spread will have been selected on *independent* evidence tending to show a likelihood of guilt. That is a main factor that constrains the universe of confusable faces that might be presented for identification. But what if we simply trawl through hundreds or thousands of faces looking for a face that meets the witness’s resemblance criteria? As Dr. Ebbesen appears to suggest (and this is clearly right), our confidence

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94. Ebbe B. Ebbesen, *Some Thoughts About Generalizing the Role that Confidence Plays in the Accuracy of Eyewitness Memory* 11, Nov. 3, 2000 (emphasis added) (citations omitted) (on file with authors). Dr. Ebbesen’s insights were anticipated by Professor Gross. See Samuel R. Gross, *Loss of Innocence: Eyewitness Identification and Proof of Guilt*, 16 J. LEGAL STUD. 395, 399 (1987); see also Gary L. Wells, *Eyewitness Identification: Systemic Reforms*, 2006 WIS. L. REV. 615 (suggesting that suspects should not be placed in photo or corporeal line-ups unless there is independent evidence inculcating them).

95. Ebbesen, *supra* note 94, at 13.

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in any resulting selection of that person as being the culprit should plummet. And that is exactly what has happened in the case of numerous convicted innocents, because these “trawl search” procedures are standard investigatory practices.<sup>96</sup>

It appears to be the inevitable fate of every generation to follow various investigatory procedures that later generations will condemn. Our failure to recognize the “trawl search” problem in its various manifestations in the criminal investigation setting is likely to be one of those errors.

Let us expand upon the mechanism and implications of a trawl search a bit more. The problem of the trawl search has been understood to a degree in the sciences and in general statistical theory for a while, where it has been called variously “data dredging,” or “data trawling.”<sup>97</sup> It was first noticed when large public databases became generally available to researchers. At that point, anyone with a computer could “trawl through” the database, looking for correlations between data categories. If the database contained enough data that could be categorized in various ways, it was easy to predict that a certain number of them would correlate very highly, just at random. If one usually thinks that a correlation between variables in an ordinary research setting that would be accounted for by random variation only one time in twenty is a meaningful correlation (this is the most common criterion for a “significant” correlation), it is easy to see that such an approach cannot be applied to a data trawl. This is because if you examine twenty correlations in a large database at random, you are likely to find one that correlates highly enough to expect it at random, well, only one time in twenty. The appearance of significance in this context is therefore spurious, and a conclusion of significance would be unwarranted.<sup>98</sup>

There are various responses to the data trawling problem in a research setting that have been suggested (none entirely satisfactory), which need not concern us further here. The important thing to note is that much of what is done in criminal investigation presents problems analogous to the data trawling problem.

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96. The case of Alan Newton presents a classic example. The rape victim chose Newton's photo from her hospital bed out of a file of about 200 mugshots. The other witness, shown Newton's photo in a photo array, also selected it. From this circumstance one might safely infer that Newton resembled the perpetrator. No other evidence connected him with the crime. The next day, the victim and the other witness picked Newton out of a line-up. A Bronx jury disbelieved Newton's alibi evidence and convicted him. Newton served twenty-two years before he was exonerated by DNA evidence and freed in August 2006. See *Alan Newton*, INNOCENCE PROJECT, [http://www.innocenceproject.org/Content/Alan\\_Newton.php](http://www.innocenceproject.org/Content/Alan_Newton.php) (last visited Nov. 5, 2011). For a discussion of a similar problem regarding confusably similar fingerprints which might be generated by a fingerprint database trawl, see Itiel E. Dror & Jennifer L. Mnookin, *The Use of Technology in Human Expert Domains: Challenges and Risks Arising From the Use of Automated Fingerprint Identification Systems in Forensic Science*, 9 LAW, PROBABILITY & RISK 47 (2010). For a formal Bayesian analysis of the general problem without mentioning the trawl search phenomenon, see Avraham M. Levi, *Are Defendants Guilty If They Were Chosen in a Lineup?*, 22 LAW & HUM. BEHAV. 389 (1998).

97. See Karin B. Michels & Bernard A. Rosner, *Data Trawling: To Fish or Not to Fish*, 348 LANCET 1152 (1996), available at [http://www.cceb.med.upenn.edu/pages/courses/EPI520/2006/Michels\\_Rosner\\_1996.pdf](http://www.cceb.med.upenn.edu/pages/courses/EPI520/2006/Michels_Rosner_1996.pdf).

98. See generally Mark Klock, *Finding Random Coincidences While Searching for the Holy Writ of Truth: Specification Searches in Law and Public Policy or Cum Hoc Ergo Propter Hoc?*, 2001 WIS. L. REV. 1007.



The attention of lawyers, judges, and legal academics was first called to this kind of problem in regard to so called “cold hits” in searches of DNA databases.<sup>99</sup> In the case of DNA markers, good data from population studies enables us to determine defensible random match probabilities for a particular profile derived from a particular test—that is, the likelihood of drawing someone at random with the same characteristics from a large population. Let us assume that DNA is recovered from a crime scene and that this DNA is circumstantially linked strongly to the perpetrator of the crime. Let us further assume that for various reasons such as degradation, this DNA testing results in a random match probability that is high for a DNA test: one person in every ten thousand would be expected to have the same profile.<sup>100</sup> Now assume that the state has assembled a DNA database of ten thousand persons. We search the database looking at each member and comparing their profile to the one from the crime scene (a “trawl search”). We discover one person with a match (what is called “cold hit,” meaning that there was no other evidence of their involvement in the crime prior to the database match). What does that tell us?

Well, it tells us some things, but a lot less than many people would initially be tempted to think. It tells us that, unlike the other 9999 persons in the database, the one person we found is a candidate to be the perpetrator, and one that falls into a set significantly smaller than the whole world. However, it also is true that there are many other people (one per ten thousand) out in the world with the same characteristics. *Just because our database was too small to capture them doesn't mean they aren't there.* So, while it would not be irrational to investigate the one we have found, it would be irrational to get too much “tunnel vision” investment in his guilt, and it would also be irrational to convict him solely on this information. This would be easily illustrated if we expand our database to 200,000, which then yields the expected twenty indistinguishable candidates. Investigate further, yes. But picking the first one out of those twenty, and convicting on no more information than that, would be obviously ludicrous.

It is easy to see the problems of the use and misuse of trawl search hits in the illustrative context of a DNA database search. What is harder to see is that many currently common investigative techniques in obtaining eyewitness identifications are nothing more than trawl searches, and trawl searches with what are likely to be high random match probabilities, which are then treated inappropriately as if they had yielded more than that.

Initially, this is probably easiest illustrated with an example from a very common practice involving mugshots. Assume a single witness to a crime, say a street shooting

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99. See NAT'L RESEARCH COUNCIL, COMM. ON DNA TECH. IN FORENSIC SCI., DNA TECH. IN FORENSIC SCI. 32, 124 (1992), available at <http://www.nap.edu/books/0309045878/html>; Peter Donnelly & Richard D. Friedman, *DNA Database Searches and the Legal Consumption of Scientific Evidence*, 97 MICH. L. REV. 931 (1999).

100. The text simply assumes that the hypothesized random match probability is accurately derived and expressed. Figuring the random match probability in “partial match” situations presents complications both of definition and of statistics, which are well analyzed in David H. Kaye, *Trawling DNA Databases for Partial Matches: What Is the FBI Afraid Of?*, 19 CORNELL J.L. & PUB. POL'Y 145 (2009).



resulting in death. The witness is set to work by the police examining mugshots of persons fitting the general description given by the witness (male, Hispanic or light-skinned black, age 25–35, 5'10"–6'2", lean but muscular). The witness sees a picture the witness asserts either "looks like" or "is" the perpetrator. That witness is then allowed to discontinue the search through the "database" (which has, incidentally, already been selected to be rich in candidates that might be right, but also which might be confusingly wrong).<sup>101</sup> At this point, the witness may be asked to view a corporeal line-up containing the person they have already selected. Selection at the corporeal line-up adds little new information to the original selection. But note, we have no way of knowing how many other photos in the photo "database" would also have been selected by the witness if she had been requested to go through the entire available universe of generally conforming photographs, and if that had been the search protocol from the beginning. This is exactly like stopping a DNA database search on the cold hit of the first matching person in the database.

The problem is compounded when there is more than one witness. The witnesses are all put to work looking at the mugshots independently. When one witness makes a selection, the rest are often told to stop and the selection of the first witness is put in a photo spread, which is then administered to the other witnesses. Since the first witness selected their first-encountered similar photograph based on resemblance to the perpetrator, it is hardly surprising when some or all of the other witnesses pick the candidate out on that basis. Now the initial trawl search has become the hidden springboard to multiple identifications which superficially appear independent, but which no one can be confident are not merely unrecognized echoes of the original improperly terminated trawl search.

For these reasons, we believe that the use of trawl search procedures in suspect identification should be radically restructured. Any witness asked to look through mugshots should be given a minimum number to examine. This minimum number should be tied to the random match probability for mugshot-type photos matching the constraining criteria of race, sex, and age in regard to a face seen for a short time during a stressful episode. Unfortunately, while critical common sense gives good warrant to believe that this random match probability is dangerously high, the research necessary to establish its median size and its variability over common conditions has not yet been done (this is rather shocking, actually, given the amount of other eyewitness identification research that has been done in the last four decades). This research should be made a National Institute of Justice priority. Until it is done, the number could be conservatively set at 1000. Even if a selection is made early, the witness should be required to complete the viewing with the warning that many people sometimes look enough alike to be confusably similar. (This warning should also be given at the beginning of the process.) All mugshot examinations should be video-recorded to observe both the conditions, the latency involved in the selection, and any hesitation or qualification that is present either spontaneously or in exchanges with investigators.

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101. So far as we can determine, and this only anecdotally, the only check routinely made after such a selection is a check on whether the person selected was incarcerated at the time of the crime. If they were, the witness is told to resume the search.

Suspects whose photos are identified only through a trawl of mugshots should *never* be put in a standard photospread. Instead, each witness should be asked to go through the same large set of photos as the original selector, with the same instructions. If a photo selection is made by a witness, a strong argument can be made that the witness should not thereafter be involved in a corporeal line-up involving the same person, since the selection in the line-up is highly likely to merely be an echo of the photo selection, although there could arguably be some confirmatory or disconfirmatory value to the corporeal line-up. In any event, however, under no circumstances should the trier of fact be given the results of a corporeal line-up generated by virtue of a mugshot trawl without the knowledge of the way the person was originally selected, its weaknesses, and the likely high random match probability involved for the remembered face of a virtual stranger when performing such a mugshot viewing.<sup>102</sup> Investigators should be trained in these weaknesses, and trained to resist the natural tendency to invest more in such a mugshot selection than rational reflection shows that it is worth.

#### X. PERPETRATOR “WANTED” SKETCHES AND THE TRAWL SEARCH PROBLEM

What has been said here applies perhaps even more starkly to situations where a suspect is identified as a result of a supposed resemblance to a police sketch. Sketches notoriously often do not look like anyone in particular.<sup>103</sup> Hence the “match window” is wider and the random match probability higher than whatever it is with mugshots. There is likely to be enough resemblance, however, to make extremely dangerous any selection by a witness from a photo spread or corporeal line-up that is generated as the result of a resemblance to such a sketch. This is especially the case when the witness participated in the generation of the sketch, since the suspect was selected because of resemblance to the sketch, and because it is unclear whether the witness’s subjective match criteria are by reference to the criminal episode, or to the later sketch upon which much more time and attention was likely to have been spent. Indeed, one can make a reasonable argument that sketches have little use, are mostly a public relations ploy designed to let the public know that actions are being taken, and are so dangerous that the practice should be abandoned. At the very least, much more research on this issue should be undertaken than currently exists.

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102. After running experiments with mock jurors involving both DNA cold hits after a trawl search, and the related problem of investigating multiple leads and only presenting information from the leads that produced incriminating information (cherry-picking), Professors Koehler and Thompson concluded that when jurors understood the search conditions they weighted the evidence appropriately, but

our studies also suggest that people fail to think much about how evidence is generated unless they are told about it. When they are not told about the nature of the search that produced the evidence, jurors in our experiments treated the evidence as if it had been produced by a narrow search that looked only for the evidence that was found.

Jonathan J. Koehler & William C. Thompson, *Mock Jurors’ Reactions to Selective Presentation of Evidence from Multiple-Opportunity Searches*, 30 LAW & HUM. BEHAV. 455, 466 (2006).

103. For a recent overview by the polymath Cecil Adams, see Cecil Adams, *How Accurate Are Police Sketches of Suspected Criminal*, THE STRAIGHT DOPE (May 7, 2010), <http://www.straightdope.com/columns/read/2937/how-accurate-are-police-sketches-of-suspected-criminals>.

## XI. BLIND ADMINISTRATION OF LINE-UPS

Finally, whatever one's position on other issues of line-up presentation,<sup>104</sup> it is clear that all line-ups, whether photographic or corporeal, should be administered blind. As one of us has pointed out repeatedly in various places, while there are still perhaps tenable arguments to be made and research to be done on the relative costs and benefits of simultaneous versus sequential presentation (with or without "second looks" being allowed), there is no rational argument that non-blind presentation adds anything of epistemic worth.<sup>105</sup> Any marginal increase in selection by virtue of non-blind administration is virtually by necessity the result of some sort of cueing, conscious or unconscious, and is not the product of the witness's reliable knowledge, but merely an induced echo of the opinion of the administrator. In addition, various logistical arguments that have been made in the past, such as the difficulty in small police departments of finding a person other than the case detective to administer a photo array, or the necessity for the case detective's participation to make the witnesses comfortable and cooperative, have been rendered untenable by technological advance. It is a fairly trivial programming problem. Any laptop computer with a videocam can be programmed to generate the photo array digitally in a random order at the touch of a button<sup>106</sup> and can be set up so that the whole process is recorded, with the order of photo presentation unknown to the administrator, who must remain behind the screen while the witness hears the instructions before bringing up the photo spread by a simple keystroke.<sup>107</sup> Such programs ought now to be relatively cheap, and have the advantage of showing witness hesitation, latency, etc. Even small rural departments can afford a laptop and a scanner, plus the required software. And even in the absence of such software, there are lowtech solutions, such as those reflected in the Ramsey County, Minnesota guidelines.<sup>108</sup> There is simply no excuse for the non-blind administration of any kind of line-up or photo array in the modern world, period.

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104. For instance, the debate over the costs and benefits of sequential presentation of the suspect and foils in both corporeal and photographic lineups has generated considerable debate. See the discussion of the issue in Steven E. Clark & Ryan D. Godfrey, *Eyewitness Identification Evidence and Innocence Risk*, 16 PSYCHONOMIC BULL. & REV. 22, 33–35 (2009), <http://www.springerlink.com/content/402071010p625988/fulltext.pdf>.

105. See Risinger, *supra* note 10, at 796–99; D. Michael Risinger, *Inquiry, Relevance, Rules of Exclusion, and Evidentiary Reform*, 75 BROOK. L. REV. 1349, 1365–66 (2010); D. Michael Risinger, *The NAS/NRC Report on Forensic Science: A Path Forward Fraught with Pitfalls*, 2010 UTAH L. REV. 225, 239 n.52 (2010).

106. For an example of such a program, see *GRIP Intelligence Link Analysis Program*, DB SOFTWARE ASSOCIATES, <http://www.dbsoftwareassociates.com/lineup.htm>.

107. While we know of no commercial product currently incorporating all of these characteristics, they present fairly trivial programming problems and the necessary components are relatively cheap.

108. See Susan Gaertner & John Harrington, *Successful Eyewitness Identification Reform: Ramsey County's Blind Sequential Lineup Protocol*, POLICE CHIEF MAG. (Apr. 2009), [http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display&article\\_id=1776&issue\\_id=42009](http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display&article_id=1776&issue_id=42009).

## XII. WITNESS INTIMIDATION AND MALLEATION

Many of the reforms we have recommended above, specifically the neutralization of the pre-charge investigation, the continued availability of judicial supervision post-charge, and most especially the various requirements of video recording, would have the effect of reducing witness malleation by the police, and also of insuring that the exact contours of any “deals” explicitly or implicitly offered or hinted at would be documented unambiguously and exactly. We are not asserting that the problems of witness malleation and information massage, and the problems of “sawing off” or “sanding off” inconvenient anomalies in regard to information, are always conscious, or even limited to the prosecution. We assume that partisan advocates, on both the prosecution side (including under current arrangements the police) and on the defense side will undertake these things more or less equally given equal opportunity. But such opportunities are simply more common on the prosecution side, as well as more devastating to the innocent suspect who may later be charged and convicted. We believe that requirements of full mutual disclosure of information developed before charge, coupled with easy resort to judicial supervision, will reduce the distortion of sources of information on both sides. In addition, the structure we have suggested also alleviates any problems of witness intimidation by the prosecution.

What we have not addressed directly in these proposals heretofore is witness intimidation by the defense, including by the defendant himself. In many types of serious crime, especially crime with gang and organized crime involvement, this is a serious potential problem. Without some affirmative steps toward solving that problem, our suggestions for innocent changes will probably be resisted. We believe that what could ameliorate the witness intimidation problem most effectively is the deposition of prosecution witnesses by the prosecution as soon after the charging event as will allow the defense to review the information developed up to that time in order to do a reasonable cross-examination, coupled with the understanding that if anything happens to the witness before trial that results in unavailability or substantial change in position, the deposition will be available for use by the jury.<sup>109</sup> While this does not eliminate all motive to intimidate, it would so reduce it as to hopefully bring it within manageable proportions, while at the same time removing the too-easily invoked excuse of potential witness intimidation as a reason to keep the defense in the dark about essential aspects of the case until trial.

## XIII. MOTION PRACTICE AND PLEA BARGAINS

We cannot end this summary of recommended innocent changes in pretrial criminal procedures without at least touching on the effects on the innocent if the effulgent variety of technically complicated grounds for pretrial attack on various

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109. A set of suggestions aimed generally toward the same end is to be found in Donald A. Dripps, *Controlling the Damage Done by Crawford v. Washington: Three Constructive Proposals*, 7 OHIO ST. J. CRIM. L. 521, 523–24 (2010). Our approach has the advantage of retaining the opportunity to cross-examine. We take no position on the advisability of one or more of Professor Dripps’s proposals as a supplement to ours.

## INNOCENCE IS DIFFERENT

aspects of the prosecution case by motion, which have expanded exponentially since, and as a result of, the “procedural revolution” of the 1960s. We tend to agree with Professor Stuntz that the effect of the procedural revolution has been a mixed blessing to the factually innocent, and that too many defense attorneys have come to devote more time and mental energy to motion practice than to the factual aspects of investigation, preparation, and trial.<sup>110</sup> We would hope that some of what we have suggested, if operationalized, would go some way toward alerting the defense bar to the necessity of treating claims of factual innocence differently, and to shifting the focus in such cases.

We must also say something about the effect of the plea bargain system on the innocent.<sup>111</sup> There is no doubt that the plea bargaining system hurts the factually innocent almost exclusively among all other possible categories of defendant. Those overcharged and normatively innocent of the top counts can often, or even usually, obtain a plea that more accurately reflects their level of responsibility, and those that are guilty in every sense can often obtain an actual bargain. But the factually innocent are simply in a hopeless position. They can accept a plea they do not deserve, which represents a true miscarriage of justice, or they can reject the plea and run a high risk of a much higher sentence if convicted (impossible to rule out, and often likely), which is an even worse miscarriage of justice. If they plead, they give up virtually all hope of later exoneration, and if they go to trial and are convicted they may give up most hope of ever being released (depending on the seriousness of the crime and the availability of what is usually onerous, and pro bono, post-conviction labor). It is hard to know exactly what to do to alleviate this poisonous situation. The volume of criminal business in the system means that plea bargains are unlikely to be eliminated in favor of universal trials. Rewarding plea rejection instead of punishing it would incentivize gaming of the system that would not end up being beneficial to the truly innocent, resulting as it likely would in yet another haystack, a trials haystack, in which the factually innocent would be even more concealed. Probably the most we could hope for would be a caution to the judge not to impose sentences much in excess of rejected pleas when there is some level of residual doubt after a conviction, and to require parole boards not to automatically punish persons who have rejected plea bargains and continue to maintain their innocence when their parole eligibility arrives.

## XIV. CONCLUSION

As we said at the outset, what we have written is part of a project to recast the system of criminal procedure from an innocent perspective. We have limited ourselves to pretrial procedure in this initial installment, although some indications of our thinking on trial processes and appeals are suggested in the previous work of one of us. We intend to finish the other two installments over the course of the next year or two. But even if we were to be distracted from that goal by other necessary pursuits, we

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110. See Stuntz, *supra* note 25, at 40.

111. A study of the vast literature of plea bargaining may profitably begin with McCONVILLE & MIRSKY, *supra* note 31.

hope that this piece has shown one potentially fruitful way to think about accommodating the interests of the factually innocent within the criminal justice system, and in convincing the reader that “innocence is (or should be) different.”